Filed 7/28/20 P. v. Lovejoy CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DIANA LOVEJOY et al., Defendants and Appellants.	D073477 (Super. Ct. No. SCN363925)

APPEALS from judgments of the Superior Court of San Diego County, Sim Von Kalinowski, Judge. Judgments affirmed; remanded for resentencing as to appellant McDavid.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant Diana Lovejoy.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant Weldon K. McDavid.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Diana Lovejoy and Weldon K. McDavid appeal their judgments after a jury found them guilty of conspiracy to commit murder and the premeditated attempted murder of Greg Mulvihill, Lovejoy's ex-husband. In his appeal, McDavid contends: (1) the trial court erred by allowing the prosecutor to present evidence of his two prior misdemeanor convictions for carrying a concealed firearm and the reasons for his involuntary separation from the United States Marine Corps; (2) the prosecutor committed prejudicial misconduct in closing argument by positing a hypothetical situation involving gang members; and (3) the court erred by imposing certain fines and fees without finding that he had the ability to pay them. In a supplemental letter brief, McDavid further contends that the court abused its discretion by failing to exercise its discretion under Penal Code section 12022.53, subdivision (h),[1] to strike the section 12022.53, subdivision (d) enhancements for personally using a firearm and causing great bodily injury in committing his two offenses or, in the alternative, that his counsel rendered ineffective assistance in failing to request that the court strike the section 12022.53 enhancements.[2] In her appeal, Lovejoy contends: (1) the prosecutor committed prejudicial misconduct by arguing in closing that Lovejoy had a financial

---

1 All statutory references are to the Penal Code unless otherwise specified.

2 At McDavid's sentencing, the court, inter alia, imposed and executed a section 12022.53, subdivision (d) enhancement related to his conviction for conspiracy to commit murder and imposed, but pursuant to section 654 stayed execution of, a section 12022.53, subdivision (d) enhancement related to his conviction for premeditated attempted murder.

motive to murder Mulvihill, or, if the prosecutor's argument did not constitute error, that she was denied her right to effective assistance of counsel; and (2) her premeditated attempted murder conviction must be reversed because Senate Bill No. 1437 (2017-2018 Reg. Sess.), section 2, amended section 188, subdivision (a)(3), effective January 1, 2019, with respect to the malice required for murder, and the benefit of that amendment applies retroactively to her premeditated attempted murder offense. We vacate McDavid's sentence and remand the matter for resentencing to allow the trial court to exercise its discretion whether to strike the section 12022.53, subdivision (d) enhancements imposed against McDavid. In all other respects, we affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

Lovejoy and Mulvihill married in 2007 and had a son in 2012. Before their son's birth, they began having marital problems and tried marriage counseling and individual therapy. In or about June 2014, Lovejoy became employed. Mulvihill did not have a job at that time and was their son's primary caregiver, although they also had a nanny.

In July 2014, Lovejoy obtained a temporary restraining order against Mulvihill, falsely claiming that he had sexually assaulted her and their son. Mulvihill moved out of the family home and thereafter usually slept in his car. After initially being prevented from seeing his son as a result of Lovejoy's claims, Mulvihill was later able to have supervised visits with him and eventually had unsupervised visits. In November 2015, Mulvihill was awarded 50 percent custody of their son after Lovejoy's accusations were determined to be unfounded.

On June 26, 2016, after contentious marital dissolution proceedings, Lovejoy and Mulvihill entered into a marital settlement agreement. That agreement provided, inter alia, that Lovejoy would keep the family home and would pay Mulvihill a community property equalization payment of $120,000 within 90 days of the execution of the agreement (i.e., by September 25, 2016). That payment apparently was to be paid from either refinancing their community residence or the proceeds of the sale of a condominium unit separately owned by Lovejoy.

On Christmas Day in 2015, Lovejoy met her aunt, Diana Clark, at a restaurant. Lovejoy asked Clark to help her find someone to kill Mulvihill. It appeared to Clark that Lovejoy wanted Mulvihill dead and "had it all figured out." Clark told Lovejoy that she did not know anyone who could help her.

Lovejoy met McDavid in 2015 at the shooting range where he worked. He gave Lovejoy firearm training and self-defense lessons. They eventually began a sexual relationship and, beginning in November 2015, exchanged many phone calls and texts. At some point prior to August 15, 2016, Lovejoy and McDavid formed a plan for McDavid to lure Mulvihill to a secluded area and kill him. Lovejoy agreed to pay McDavid $1,000 initially, and an additional $1,000 after he killed Mulvihill. According to their plan, McDavid would call Mulvihill and tell him a story that would cause him to go to the secluded area where McDavid would be waiting for him. McDavid told Lovejoy to buy a Tracfone that he could use to call Mulvihill without being identified. On August 15, Lovejoy entered a Best Buy store and purchased a Tracfone.

On August 31, 2016, McDavid performed reconnaissance at the secluded area where he planned to lure Mulvihill. On the evening of September 1, McDavid called Lovejoy, told her that he was ready to "get this over with," and asked her to meet him at a park-and-ride lot in Carlsbad. Lovejoy met McDavid there, drove him to the secluded area and dropped him off. Per McDavid's instructions, Lovejoy gave him some items belonging to her son (i.e., two towels) that he could place at the scene. McDavid thought that Mulvihill would recognize the items as belonging to his son and realize that the caller had access to his son. McDavid told Lovejoy that afterward, he would call her to pick him up.

At the scene, McDavid used one of the towels that Lovejoy had given him to wipe himself after defecating. He placed the other towel at the base of a power pole. At about 10:30 p.m., McDavid used the Tracfone to call Mulvihill. McDavid told Mulvihill that McDavid was a criminal investigator hired by Lovejoy and that he had some documents that Mulvihill would want to see regarding custody of his son. When Mulvihill asked questions about the documents, McDavid told him that he would just have to see them and that McDavid would call back in a few minutes. Two minutes later, McDavid called back and told Mulvihill that he would leave the documents at a location where Mulvihill could find them. McDavid stated that he would call back again and hung up. Mulvihill called the Carlsbad Police Department's nonemergency number and told the dispatcher about the calls. When he asked whether the calls seemed odd, the dispatcher stated that they seemed a little unusual, but did not seem concerned.

McDavid called again and gave Mulvihill directions to the area where he said Mulvihill could find the documents taped to a power pole. Mulvihill was familiar with the area because he and Lovejoy had hiked and biked there before. McDavid told Mulvihill that this would be his "one chance" to see the documents. Because he could not risk having the custody case reopened, Mulvihill decided to go to the location to learn more about what was going on. Mulvihill was uncomfortable about going to the location alone, so he called his boss, Jason Kovach, who lived in a nearby apartment, and asked Kovach to accompany him. Kovach agreed and Mulvihill drove them to the designated location, which was about one mile from their homes. After exiting the car, Mulvihill carried a bright flashlight in his left hand and Kovach carried a baseball bat that Mulvihill had given him. Neither had a gun.

Mulvihill and Kovach walked along the path toward the power pole, which was about 150 feet away. Because it was very dark, they could not see anything without Mulvihill's flashlight. They saw a towel at the base of the power pole. Because Mulvihill could not see anything taped to the pole, he became suspicious and scanned the area with his flashlight. Hearing rustling in the bushes, Mulvihill shined his light in the direction of the noise and saw a person, McDavid, about 60 feet away, dressed in camouflage clothing. McDavid was lying prone on the ground and pointing a sniper rifle at Mulvihill through the bushes. Mulvihill said, "Hello?" twice and then either he or Kovach yelled "gun" or "run." As he turned to run, Mulvihill felt something hit him in the back. Mulvihill and Kovach heard shots being fired at them as they ran back to the

car. They got into Mulvihill's car and fled the scene. While driving away, Mulvihill realized that he had been shot, pulled over, and called 911.

Police responded to Mulvihill's 911 call and took him to a hospital. He had sustained entry and exit wounds from a gunshot. The entry wound was below his right armpit. A CT scan showed small metallic fragments throughout Mulvihill's chest and active bleeding in his axilla. The axilla is a potentially lethal area because it contains major arteries, veins, and nerve structures, which, if injured, could cause a patient to bleed to death. Two bullet fragments were removed from his back.

After shooting Mulvihill, McDavid ran down a path to a road, called Lovejoy, and had her pick him up. As Lovejoy drove them back to the park-and-ride lot, McDavid told her that he had "messed up."

Investigating the incident, police found a rifle round jacket on the sidewalk near the power pole. The jacket was consistent with having been fired from an AR-15. Two towels were also found at the scene, one of which had fecal matter on it. Test results showed that the fecal matter contained McDavid's DNA.

Police discovered that the Tracfone used to call Mulvihill was purchased at a Best Buy store on August 15, 2016. The store's surveillance video from that date showed Lovejoy purchasing the phone. She was wearing a salmon-colored shirt and a khaki-colored skirt at the time. Police searched Lovejoy's home and found the shirt and skirt that she was wearing when she purchased the Tracfone. They also found towels that matched the towels found at the scene of the shooting. Lovejoy's computer showed that she had searched for information regarding moon phases. The sky is darkest when there

is a new moon because no light emanates from the moon. On September 1, 2016, the night of the shooting, there was a new moon.

Police also searched McDavid's home and found numerous rifles, handguns, and upper and lower assemblies for AR-15's. They found a complete upper assembly for an AR-15 hidden under foam and sleeping bags on a garage shelf. That assembly had a suppressor and brass catcher attached to it. A brass catcher catches expended cartridge casings before they fall to the ground. The brass catcher contained seven used shell casings and one unused round. In McDavid's Jeep, they found a camouflage jacket and black pants that appeared to have dirt and plant material on them.

An amended information charged Lovejoy and McDavid with one count of conspiracy to commit murder (§§ 182, subd. (a)(1), 187, subd. (a)) (count 1) and one count of premeditated attempted murder (§§ 664, 187, subd. (a), 189) (count 2). The amended information further alleged that in committing each of those offenses, McDavid intentionally and personally discharged a firearm, causing great bodily injury (§ 12022.53, subd. (d)) and personally inflicted great bodily injury on Mulvihill (§ 12022.7, subd. (a)). It also alleged that in committing each of those offenses, Lovejoy was vicariously armed with a firearm (§ 12022, subd. (a)(1)).

At their joint trial, the prosecution presented evidence substantially as described *ante*. In his defense, McDavid called several witnesses who testified that he was a skilled marksman, implying that if McDavid had intended to kill Mulvihill, he could have. In particular, McDavid presented the testimony of Barry Reder, McDavid's shooting student and friend, who testified that McDavid could easily hit a target 100 yards away.

McDavid also presented the testimony of Christopher Lazano, who stated that he knew McDavid from the Marine Corps when they were both shooting instructors at the School of Infantry at Camp Pendleton. Lazano believed that McDavid would not have any trouble hitting a target at center mass, even with ambient lighting. He testified that Marines are taught to never point a gun at anyone unless they intend to kill that person.

McDavid also presented the testimony of Vincent Kyzer, an active duty Marine gunner, who described the requirements for becoming a competent shooter in the Marine Corps. Marines are trained to shoot at a target's center mass (i.e., chest) because most of the arteries that cause major damage are located there. It is more difficult to shoot at a moving target than a stationary target. Marines are trained to go into darkness 30 minutes in advance to allow their eyes to adjust to poor lighting. If a light is shined on a shooter by the enemy, the shooter likely would shoot at the last known location of the target's center mass. If a shooter was planning to ambush an enemy, the shooter would place a marker at the location for the planned shooting and wait for the enemy to get close to that marker. Kyzer admitted that a power pole could serve as a marker for a shooter's range.

Kyzer testified that he knew McDavid from the Marine Corps and described him as a skilled, accurate, and expert rifleman while he was in the Marine Corps. Kyzer believed that McDavid would be "extremely accurate" using a rifle from a prone position and that, when McDavid was a Marine, he would never miss a target that was only 20 yards away. After McDavid left the Marine Corps, he became even more proficient in marksmanship and obtained instructor credentials.

McDavid testified in his own defense, stating that at the time of his arrest, he was working as a firearms instructor and salesman at a shooting range. He was a rifle, pistol, and shotgun instructor for the NRA. He had been a firearms instructor for 17 years, including while he was serving in the Marine Corps. He joined the Marine Corps in 1997 when he was 30 years old and left in 2009. While in the Marine Corps, he received firearms training and became a ninth award rifle expert and a seventh award pistol expert. Since his separation from the Marine Corps, his shooting skills had improved.

McDavid testified that he met Lovejoy in 2015 when he was her shooting instructor at the shooting range at which he worked. Lovejoy told him that she was going through a divorce and was having custody issues with Mulvihill. She told McDavid that Mulvihill used drugs and that, as a felon, illegally owned a firearm. She also told him that Mulvihill was molesting their son and had digitally penetrated her against her will. She stated that she had filed a police report regarding those incidents, but the police had done nothing.

McDavid testified that in June or July 2016, he and Lovejoy began discussing strategies to acquire evidence against Mulvihill so that she could obtain full custody of their son. They planned to lure Mulvihill to a secluded area by having McDavid call him and tell him that McDavid was a private investigator hired by Lovejoy. McDavid would tell Mulvihill that he had evidence of child abuse committed by Mulvihill, which would be left at the base of a power pole for Mulvihill to retrieve. McDavid testified: "[A]nybody who's not guilty of child abuse, in my mind, would not come out at night to meet someone or to pick up any evidence that they didn't know where it came from."

McDavid said that he had planned to videotape Mulvihill retrieving the evidence in the dark and then set up a subsequent meeting at which he would try to sell Mulvihill a blank thumb drive that purportedly contained additional evidence of child abuse. Lovejoy was to pay McDavid $2,000 to gather that information on Mulvihill. McDavid testified that he and Lovejoy had never discussed that he would hurt or kill Mulvihill.

McDavid testified that on August 31, 2016, he went to the secluded location and performed reconnaissance. On September 1, on returning home from a shooting competition in Chico Hills, he got into an argument with his wife. Angry and frustrated, McDavid called Lovejoy and told her, "Let's just get this over with. So I can be done with this." He told Lovejoy to meet him at the park-and-ride lot in Carlsbad. When she arrived, McDavid placed in her car a bag containing the AR-15 gun that he had used earlier that day at the competition. When Lovejoy asked him why he brought the gun bag, he replied, "just in case." McDavid testified that he never intended to kill Mulvihill, but brought his AR-15 because he knew that Mulvihill owned a gun and he (McDavid) needed to be prepared in case Mulvihill brought the gun.

McDavid testified that in response to his request that Lovejoy bring something that Mulvihill would recognize as belonging to their son, she gave him two towels, which he planned to place at the base of the power pole. Lovejoy drove McDavid to the secluded area and dropped him off. McDavid told her to go home until he called after he got the information and needed to be picked up. Lovejoy paid him $1,000 upfront and would give him another $1,000 when he acquired all of the evidence against Mulvihill.

After arriving at the secluded area, McDavid called Mulvihill and used the private investigator story to lure him to the area. Because he had to defecate, McDavid did so and used one of the towels to wipe himself. He placed the other towel at the base of the power pole. McDavid then positioned himself 60 feet from the power pole and waited for Mulvihill to arrive. McDavid realized that he would not be able to videotape Mulvihill picking up the evidence because Mulvihill would notice the light from McDavid's cell phone as it was recording.

About 20 minutes later, Mulvihill arrived with Kovach. Mulvihill was holding a flashlight and scanning the area with it as he and Kovach walked toward the power pole. McDavid testified that the flashlight gave Mulvihill a tactical advantage. Nevertheless, McDavid said that he could see Mulvihill sufficiently so that he could have shot him then, if he had wanted to. Mulvihill shined his flashlight directly onto McDavid and said, "hello." McDavid did not move. According to McDavid, Mulvihill then said, "I've got a gun." McDavid decided to shoot at the flashlight to remove Mulvihill's tactical advantage. Although he could have killed Mulvihill by firing two shots at his center mass, McDavid testified that he decided not to do so because "killing is not always the answer." McDavid testified that he did not intend to kill Mulvihill. However, when Mulvihill said he had a gun, McDavid feared for his life. McDavid shot at Mulvihill's flashlight. McDavid then fired six shots into the air and stopped shooting after Mulvihill and Kovach ran away. McDavid believed that his shot hit the flashlight and did not realize until later that he had shot Mulvihill.

McDavid testified that he would not miss a man-sized target if he tried to shoot it, even if the target was 100 yards away. If he wanted to kill a person who was 100 yards away, he could hit them at their center mass with no problem and there would be no reason for him to wait until the person was only 60 feet away.

Lovejoy did not present any evidence in her defense.

In rebuttal, the prosecution presented the testimony of Carlsbad Police Department Sergeant Greg White, a firearms specialist. White testified that if McDavid were truly aiming at Mulvihill's flashlight, he would expect that McDavid may have hit Mulvihill's hand, but not his armpit, because McDavid was such a skilled shooter. White believed that McDavid's shot went toward Mulvihill's center mass as McDavid intended, but it struck Mulvihill in his armpit instead because Mulvihill rotated his body to run after seeing McDavid.

The jury found Lovejoy and McDavid guilty of conspiracy to commit murder (count 1) and premeditated attempted murder (count 2), and found true all of the related allegations. On January 31, 2018, the court sentenced Lovejoy to an indeterminate term of 25 years to life on count 1 and a consecutive one-year term for the related section 12022, subdivision (a)(1) enhancement, for a total term of 26 years to life in prison. The court also imposed, but pursuant to section 654 stayed execution of, an indeterminate term of 25 years to life on count 2 and a consecutive one-year term for the related section 12022, subdivision (a)(1) enhancement.

Also on January 31, 2018, the court sentenced McDavid to an indeterminate term of 25 years to life on count 1 and a consecutive indeterminate term of 25 years to life for

the related section 12022.53, subdivision (d) enhancement, for a total term of 50 years to life in prison. The court also imposed, but pursuant to section 654 stayed execution of, an indeterminate term of 25 years to life on count 2, a consecutive indeterminate term of 25 years to life for the related section 12022.53, subdivision (d) enhancement, and a three-year term for the related section 12022.7, subdivision (a) enhancement.

Lovejoy and McDavid each filed timely notices of appeal.

DISCUSSION

McDAVID'S APPEAL

I

Admission of Evidence of McDavid's Two Prior Misdemeanor Convictions and Involuntary Separation from the Marine Corps

McDavid contends that the trial court erred by allowing the prosecution to present evidence regarding his two prior misdemeanor convictions for carrying a concealed firearm and the reasons for his involuntary separation from the Marine Corps.

A

Before trial, McDavid moved in limine to preclude the prosecution from presenting evidence regarding his two prior misdemeanor convictions for carrying a concealed firearm as impeachment evidence if he were to testify in his defense. He argued that evidence of his prior misdemeanor convictions should be excluded as unduly prejudicial to him, that the convictions were not crimes of moral turpitude, and that the presentation of such evidence would require an undue consumption of time under Evidence Code section 352's balancing test. At a pretrial hearing, the prosecutor stated

that she did not intend to present evidence of McDavid's two prior misdemeanor convictions as part of her case-in-chief, but argued that those convictions might become relevant if McDavid or one of his other defense witnesses testified that McDavid "is someone who handles firearms with exquisite care and always follows the law and would never do anything unlawful with a firearm." The prosecutor argued that the admissibility of the two convictions therefore "just kind of depends on how the evidence turns out."

The trial court agreed that the evidence concerning McDavid's two prior misdemeanor convictions should be excluded from the prosecution's case-in-case, but stated that "[i]f the defense through testimony, either from a defendant or from someone else, a character witness of some sort, opens the door to this, then [that evidence] could be appropriate there."[3] The court stated: "[I]f the People feel at some point the defense has opened the door, then before inquiring about it, then if you can address that to the Court, outside the presence of the jury, and we will allow counsel to argue against that."

As part of his defense case, McDavid presented testimony from Kyzer, an active duty Marine, about how Marines are trained as shooters. Kyzer testified that McDavid was an expert shooter when he was in the Marine Corps. Kyzer twice referred to McDavid as "Staff Sergeant McDavid." Kyzer also testified extensively about Marine

---

3 The court also preliminarily excluded under Evidence Code section 352 evidence regarding McDavid's prior misdemeanor conviction for solicitation of prostitution. Because McDavid did not move in limine to exclude evidence pertaining to his involuntary separation from the Marine Corps, the court did not address or rule on the admissibility of that evidence at that time.

Corps training and practices. On cross-examination, Kyzer testified that he had been McDavid's supervisor in the Marine Corps from 2004 or 2005 to 2007 or 2008.

McDavid testified in his defense about his exceptional abilities as a shooter, his service as a Marine, and the high-level of training that he had received while a Marine. In particular, he testified that while in the Marine Corps, he attained an expert rating as a shooter (i.e., ninth award rifle expert and seventh award pistol expert). He also testified regarding the five safety rules of the Marine Corps. In answering his counsel's question whether he would have had any reason to research the moon's phase on September 1, 2016, McDavid stated: "*As a Marine*, no. *We* commonly say: *We* will rule the night. *We* are much better in darkness situations than any other military in the world. So light conditions would not matter." (Italics added.)

On cross-examination, the prosecutor asked McDavid questions about his separation from the Marine Corps. The following exchange occurred:

> "[Prosecutor:] Now you keep talking about all your Marine Corps training. You are not currently a Marine, correct?
>
> "[McDavid:] I got out in 2009, so no.
>
> "[Prosecutor:] And you are not entitled to wear a Marine uniform at this time; is that correct? [¶] . . . [¶] . . .
>
> "[McDavid:] Typically, once you are out of the Marine Corps, you don't go around wearing a uniform. So no.
>
> "[Prosecutor:] But you're not entitled to wear a Marine uniform now, correct? [¶] . . . [¶] . . .
>
> "[McDavid:] You're saying 'entitled,' *I earned the title Marine*. So if I wanted to wear a Marine uniform, no one would stop me.

"[Prosecutor:] Are you entitled to re-enlist in the Marine Corps?

"[McDavid:] No. I'm also too old now.

"[Prosecutor:] Is that the only reason you're saying [that] because of your age?

"[Lovejoy's counsel:] Objection, Your Honor. Relevance.

"[The Court:] Overruled.

"[Prosecutor:] You said that you couldn't get in because of how old you are. Is that the only reason why you can't get into the Marine Corps again if you wanted to?

"[McDavid:] The re-enlistment code, I was given at my administrative separation board would not allow me to re-enlist.

"[Prosecutor:] When you left the Marine Corps, that was not of your own volition, you did not want to leave the Marine Corps at the time, correct? [¶] . . . [¶]

"[McDavid:] Do you know how an administrative separation board works?

"[Prosecutor:] Objection. Nonresponsive.

"[The Court:] Sustained. [¶] Just listen to her question and answer that question.

"[Prosecutor:] You were forced out of the Marine Corps against your wishes, correct?

"[McDavid:] Yes." (Italics added.)

During the remainder of the prosecutor's cross-examination of McDavid, she did not ask any additional questions about the circumstances of his separation from the Marine Corps.

On redirect examination, McDavid's counsel asked him about his administrative separation from the Marine Corps. When asked how an administrative separation works, McDavid replied:

> "The Uniform Code of Military Justice put in place a means to administratively separate a member when they are guilty of certain offenses ranging from minor offenses over a period of time to major offenses that are not worthy of being sent to court martial.
>
> "*The administrative separation process* is, I would say, outdated because it *is no longer a fair process*. When it was put into place, ethically and morally, the commander would make a decision and he would send three members to hear the evidence and decide the evidence.
>
> "*The evidence that was presented against me was false to a large degree*. There were some elements of truth to it. The XO of my unit, that's executive officer, he wanted me out, and—so he sent three members, who are under his command, who he writes their fitness reports, and that has an effect on their career[s]. And he tells them what the outcome he wants. And as you can imagine, if your boss at work told you you're going to go and decide whether this guy stays or goes and I want him gone, well, that's what happens." (Italics added.)

During recross-examination, the prosecutor followed-up on McDavid's answer on redirect examination about his administrative separation from the Marine Corps, asking McDavid: "You said that the reason you were kicked out of the military had nothing to do with your behavior, correct?" McDavid's counsel objected on the ground that the question misstated McDavid's testimony. The court overruled the objection, stating that McDavid "can correct that if that's not correct." McDavid then answered the question: "I did not say that." The prosecutor asked him: "Okay. You said that the reason you were kicked out of the military is because someone had it out for you, correct?" McDavid

answered: "That's not exactly correct." The prosecutor then asked McDavid: "Okay. Tell us what it is. Why you were kicked out[?]" McDavid's counsel requested a sidebar conference before McDavid answered the question.

At the sidebar conference, McDavid's counsel argued to the court that the prosecutor had "opened the door to this whole line of questioning," and had improperly done so in view of the court's pretrial rulings on his motions in limine. The court disagreed, stating:

> "My [pretrial] rulings about allowing her initially to go into those areas, it was because through the testimony of Sergeant Kyzer, other testimony that we've had about all of his training and experience and everything about being a Marine.
>
> "There was a picture being painted of him being a good Marine, whether that was exactly stated or not, that was the picture, the implication, the inferences that were raised by that testimony, in particular, by Sergeant Kyzer. So that's why I allowed her to go into that initially.
>
> "And then today, when you asked him how does an administrative hearing work, instead of just answering that question, he decided to go into: It's not a fair process. The evidence presented against me was false. Some elements were true and so on from there. *He is the one that opened the door*. She didn't." (Italics added.)

McDavid's counsel asked the court whether the prosecutor would now be permitted to question McDavid about the reasons for his administrative separation from the Marine Corps (i.e., his two misdemeanor convictions for carrying a concealed firearm). The court stated: "She can now. *He opened the door*. It was your question—your question didn't even ask him for that. It was just—he just decided he was going to say that. [¶] Your question was: How does an administrative hearing work? He decided

he was going to take it farther. So *he opened the door*. Once he says it wasn't a fair process, evidence presented [against] me—was false. She gets to go into it." (Italics added.)

Lovejoy's counsel interjected, arguing that it was the prosecutor who had opened the door to that line of questioning by asking McDavid whether it was appropriate for him to wear a Marine uniform. The court responded that because of the inference from Kyzer's and McDavid's testimony that McDavid was a "good Marine" and that he was, in effect, "being colored with . . . wearing a uniform in his testimony," the prosecutor would be permitted to question McDavid regarding whether he could still wear a Marine uniform. The court noted that, instead of simply answering "no," McDavid had said that he was "too old." The court stated that, by so answering, McDavid had "opened the door" to the prosecutor's questions about the reasons for his separation from the Marine Corps. McDavid's counsel replied that he had repeatedly presented evidence that McDavid was no longer a Marine. The court agreed, but said that Kyzer's testimony "really cloak[ed] this in the context of Mr. McDavid being a Marine" and "[s]o I think it's fair for [the prosecutor] to show he's not." The court explained that the inferences "from the whole tone and tenure of [Kyzer's] testimony . . . paint[ed] [McDavid] as a Marine." The court thus repeatedly explained how, in the court's view, McDavid had opened the door to the prosecutor's questions about the reasons for his separation from the Marine Corps.

When the prosecutor resumed her recross-examination of McDavid, she asked him: "The reason why you have your administrative separat[ion] hearing is what?"

McDavid answered: "Because of an arrest that happened . . . in San Diego." McDavid admitted that the arrest had actually resulted in a conviction. When the prosecutor asked McDavid whether he had been arrested twice for carrying a concealed weapon while a Marine, he replied, "Yes." He also admitted that he had been arrested for another crime, as well. In addition, McDavid testified that his executive officer believed that McDavid had lied to his master sergeant about the hearing.

After the conclusion of the trial, McDavid filed a motion for new trial, arguing, inter alia, that the court had erroneously admitted evidence concerning his prior convictions and the reasons for his separation from the Marine Corps. The court denied the motion, explaining in part:

> "Although Sergeant Kyzer's testimony related to Marine firearm training and tactics, and Defendant McDavid's training, skill and experience with firearms, there was also an unspoken implicit endorsement of [McDavid] by the fact he [Kyzer] was voluntarily testifying on his behalf. [¶] Further, on two occasions, Sergeant Kyzer referred to [McDavid] as 'staff sergeant.' And although [Kyzer] corrected himself, a mental picture of [McDavid] as a Marine was formed.
>
> "Defendant McDavid testified and specified he had been a Marine from 1997 to 2009. He talked about his training and experience as a Marine. And throughout his direct testimony were numerous, numerous references to his being a Marine. A positive mental image was created and reinforced multiple times by Defendant [McDavid] as a Marine.
>
> "Now, if not within the country generally, certainly within this community of Northern San Diego County with the proximity to Camp Pendleton, and then numerous active duty and retired Marines [who] would live in the area, there is a very positive, sympathetic view of Marines."

Based on that defense evidence, the court concluded that the prosecutor's question regarding whether McDavid was entitled to wear a Marine uniform was designed to dispel that mental image and sympathy and was therefore relevant. McDavid had replied: "I earned the title of Marine, so if I wanted to wear a Marine uniform, no one would stop me." The court noted that because McDavid had been involuntarily separated from the Marine Corps, his reply "was now misleading" and "opened the door for further questions." When the prosecutor asked McDavid whether he was entitled to reenlist in the Marine Corps, rather than simply answering "no," McDavid qualified his answer by adding, "I'm also too old now." The court concluded that this answer, although true, was misleading because McDavid had been involuntarily discharged from the Marine Corps, which rendered him ineligible to reenlist. Therefore, the prosecutor was allowed to ask McDavid whether he had been forced out of the Marine Corps. After McDavid replied, "Yes," the prosecutor did not ask any further questions on cross-examination about the circumstances of his separation from the Marine Corps.

The court then noted that on redirect examination, McDavid's counsel asked him how an administrative separation worked. Rather than simply answering the question in general terms, McDavid expanded his answer to include an explanation of the circumstances of his separation from the Marine Corps, stating: "The evidence that was presented against me was false to a large degree. The executive officer of my unit wanted me out." The court concluded that McDavid's nonresponsive answer to his counsel's question had "opened the door" for the prosecutor to inquire about the underlying circumstances of his discharge from the Marine Corps, particularly because

his answer was misleading. The court stated that McDavid's answer "totally deflected from any of his behavior that led to the administrative separation," which included two arrests for carrying a concealed firearm, another arrest, and lying to his master sergeant about one of the hearings. The court stated that although it had ruled before trial that the prosecutor would not be allowed to question McDavid about his prior convictions, the court had expressly stated that its ruling was subject to the defense case. Because McDavid made misleading statements in his defense case, he opened the door to the prosecutor's questions regarding the reasons for his separation from the Marine Corps. The court further concluded that even if it had erred in allowing the prosecutor to question McDavid, it was not reasonably probable that McDavid would have obtained a more favorable result if that evidence had been excluded. Accordingly, the court denied McDavid's motion for new trial.

B

A trial court's ruling on the admissibility of evidence is generally reviewed for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.) When a defendant testifies in his or her own defense, that defendant places his or her own credibility in issue and is subject to impeachment. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139 (*Gutierrez*); Evid. Code, § 1101, subd. (c) ["Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness"].) Further, under Evidence Code, section 780, subdivision (i), "a witness who makes a sweeping statement on direct or cross-examination may open the door to use of otherwise inadmissible evidence of prior misconduct for the purpose of contradicting such

testimony." (*Andrews v. City and County of San Francisco* (1988) 205 Cal.App.3d 938, 946 (*Andrews*).)

The admission of impeachment evidence is subject to the trial court's exercise of discretion under Evidence Code section 352. (*People v. Clark* (2011) 52 Cal.4th 856, 931, fn. omitted.) Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Because a trial court's discretion under Evidence Code section 352 is as broad as necessary to deal with the great variety of factual situations in which the issue arises, a reviewing court typically will uphold its exercise of that discretion. (*Clark*, at p. 932.) Under the abuse of discretion standard of review, the trial court's decision to admit or exclude impeachment evidence will be upheld unless it exercises its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*People v. Lucas* (2014) 60 Cal.4th 153, 240.)

C

We conclude that the trial court properly allowed the prosecutor to question McDavid about the reasons for his involuntary separation from the Marine Corps, and specifically, his two prior misdemeanor convictions. As the trial court explained, McDavid initially opened the door to the admission of that evidence by presenting in his defense case Kyzer's and his own testimony regarding his Marine Corps training. Kyzer, an active duty Marine, testified regarding Marine Corps training in shooting and, in

particular, McDavid's skills as a shooter while he was in the Marine Corps. Kyzer twice referred to McDavid as "Staff Sergeant." The trial court reasonably concluded that, by so testifying, Kyzer had painted a picture of McDavid as being a "good Marine."

McDavid's testimony also implied that he had been a good Marine. He testified that he was a Marine from 1997 to 2009 and extensively described his training as a Marine. The trial court could have reasonably concluded that the testimony of Kyzer and McDavid, which was presented in the main defense case, created a positive image of McDavid as having been a good Marine in general, and not just as a skilled shooter.

To counter that positive image created during the defense case, the prosecutor reasonably questioned McDavid on cross-examination regarding whether he was permitted to wear a Marine uniform or eligible to reenlist in the Marine Corps. McDavid answered: "No. I'm also too old now." That incomplete and misleading answer opened the door to the prosecutor's further questions regarding the circumstances of McDavid's separation from the Marine Corps, which resulted in his admission that the separation was not voluntary. On redirect examination by his own counsel, McDavid unnecessarily expanded his answer to a question asking him to explain what an administrative separation hearing was, claiming that his involuntary separation from the Marine Corps was based on "false evidence" and was the result of an "unfair process." The trial court properly found that, by initially testifying that he was "too old" to reenlist and later testifying that his involuntary separation was based on "false evidence" and was the result of an "unfair process," McDavid had "opened the door" to the prosecutor's further questioning concerning the reasons for his involuntary separation from the Marine Corps,

including his two prior misdemeanor convictions for carrying a concealed weapon, which were factors in his administrative separation hearing. The court also reasonably concluded that the prosecutor's questions could properly counter the false impression that McDavid had conveyed to the jury regarding his status as a "good Marine." (Cf. *People v. Robinson* (1997) 53 Cal.App.4th 270, 282-283.) Alternatively stated, the court reasonably concluded that the prosecutor's questions regarding McDavid's two prior misdemeanor convictions and the actual reasons for his involuntary separation from the Marine Corps were proper to correct the misleading impression from Kyzer's and his own testimony of his having been a "good Marine," and to impeach McDavid's misleading testimony concerning the reasons for his involuntary separation from the Marine Corps. (Evid. Code, § 1101, subd. (c); *Gutierrez*, *supra*, 28 Cal.4th at p. 1139.) In particular, the court also reasonably concluded that McDavid "opened the door" to that impeachment evidence by presenting testimony in his defense case that gave the jury a false impression that his involuntary separation from the Marine Corps was based on false evidence and an unfair process. (Evid. Code, § 780, subd. (i); *Andrews*, *supra*, 205 Cal.App.3d at p. 946 ["[A] witness who makes a sweeping statement on direct or cross-examination may open the door to use of otherwise inadmissible evidence of prior misconduct for the purpose of contradicting such testimony."].)

Contrary to McDavid's assertion, evidence regarding his two prior misdemeanor convictions and the reasons for his involuntary separation from the Marine Corps was relevant to impeach his testimony on direct examination. (Evid. Code, §§ 780, subd. (i), 1101, subd. (c); *People v. Rodriguez* (1999) 20 Cal.4th 1, 9 [evidence to impeach a

witness, or the existence or nonexistence of any fact testified to by a witness, is always relevant]; *People v. Doolin* (2009) 45 Cal.4th 390, 439.) Further, contrary to McDavid's assertion, the trial court did not abuse its discretion by implicitly concluding that the impeachment evidence was admissible under Evidence Code section 352. The court could have reasonably concluded that the probative value of that evidence was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice. (Evid. Code, § 352.) Under Evidence Code section 352, "prejudice" is not damage to the defense case that naturally flows from relevant, probative evidence, but rather evidence that uniquely tends to evoke an emotional bias against the defendant as an individual and has very little effect on the issues at trial. (*People v. Lopez* (2013) 56 Cal.4th 1028, 1059.) In this case, evidence of McDavid's two prior misdemeanor convictions for carrying a concealed firearm and the reasons for his involuntary separation from the Marine Corps was not unduly prejudicial under Evidence Code section 352 because that evidence had substantial probative value to impeach his testimony regarding the reasons for his involuntary separation from the Marine Corps, and was unlikely to evoke an emotional bias against McDavid. In particular, his misdemeanor convictions for carrying a concealed firearm are relatively minor in comparison to the serious offenses charged against him in this case. Further, because of the short duration of the prosecutor's questioning regarding the reasons for McDavid's involuntary separation from the Marine Corps, there was no undue consumption of time. Finally, because the two prior misdemeanor convictions for carrying a concealed firearm were so dissimilar to the instant charged offenses of conspiracy to commit murder and

premeditated attempted murder, there was no reasonable possibility that the jury would confuse those misdemeanors with the instant charges or otherwise be misled by that impeachment evidence. The court therefore did not abuse its discretion under Evidence Code section 352 by admitting evidence of McDavid's two prior misdemeanor convictions and the reasons for his involuntary separation from the Marine Corps.

McDavid also contends that the trial court erred in admitting the evidence of his two prior misdemeanor convictions and the reasons for his involuntary separation from the Marine Corps as character evidence under Evidence Code section 1101, subdivision (a) or (b) or 1102.[4] However, the court clearly did not admit the evidence of McDavid's prior misdemeanor convictions under Evidence Code section 1101, subdivision (a) or (b) or 1102. Rather, as we have concluded *ante*, the court properly admitted that evidence to impeach McDavid's testimony and to correct the false impression created by his own testimony and that of Kyzer to the effect that he was a "good Marine" and that his

---

4 Evidence Code section 1101, subdivision (a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Evidence Code section 1101, subdivision (b) provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act." Evidence Code section 1102 provides: "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [or] [¶] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)."

involuntary separation from the Marine Corps was based on false evidence and an unfair process. The evidence at issue was thus admitted by the court for independent and proper reasons (i.e., as evidence relevant to the issues and to impeach McDavid), and not as character evidence under Evidence Code sections 1101, subdivision (a) and 1102.

The trial court also correctly rejected McDavid's claim that the prosecutor, and not McDavid, opened the door to that evidence and that the evidence should therefore be excluded. As discussed *ante*, the trial court described during the sidebar conference how McDavid's defense case (i.e., Kyzer's and McDavid's testimony) had painted a picture of McDavid as a "good Marine," which permitted the prosecutor to ask McDavid whether he was still allowed to wear a Marine uniform and subsequently ask him whether he had been involuntarily separated from the Marine Corps. As discussed *ante*, when the prosecutor asked McDavid whether he was eligible to reenlist in the Marine Corps, he answered: "No. I'm also too old now." That incomplete and misleading answer opened the door to the prosecutor's further questions regarding whether he had been involuntarily separated from the Marine Corps. The court also described how, on redirect examination by his counsel, McDavid had opened the door to evidence concerning the actual reasons for his involuntary separation from the Marines by gratuitously testifying that his separation was based on false evidence and an unfair process. After McDavid opened that door, the prosecutor could properly question him about the actual reasons for his involuntary separation from the Marine Corps, which included his two prior misdemeanor convictions for carrying a concealed firearm. We conclude that the trial court correctly determined that McDavid, and not the prosecutor, opened the door to that

line of questioning and specifically, to the admission of evidence concerning his two prior misdemeanor convictions and his involuntary separation from the Marine Corps.

Finally, we reject McDavid's assertion that the trial court violated his constitutional rights by admitting evidence of his two prior misdemeanor convictions and the reasons for his involuntary separation from the Marines.[5] In particular, McDavid argues that by initially ruling prior to trial that this evidence would be excluded and reversing its pretrial ruling and admitting that evidence after McDavid had taken the witness stand and testified in his defense, the court tricked, trapped, or lured him into testifying and deprived him of the ability to make a knowing and informed choice concerning whether to testify, thereby violating his constitutional rights against compulsory self-incrimination, to testify and present a defense, to effective assistance of counsel, and to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. However, as we concluded *ante*, the trial court properly admitted that evidence under applicable rules of evidence. "Application of the ordinary rules of evidence generally does not impermissibly infringe on a . . . defendant's constitutional rights." (*People v. Kraft* (2000) 23 Cal.4th 978, 1035 (*Kraft*); see also *People v. Thomas* (2012) 53 Cal.4th 771, 807 [quoting *Kraft* and rejecting

---

[5] Because we dispose of McDavid's contentions on their merits by concluding that the trial court properly admitted evidence of his two prior misdemeanor convictions and the reasons for his involuntary separation from the Marine Corps, we need not, and do not, address the People's alternative assertions that McDavid forfeited those contentions by not timely objecting to the admission of that evidence and that, if he forfeited those appellate contentions, he was not denied the effective assistance of counsel based on his counsel's failure to so object.

appellant's claim that admission of evidence violated his constitutional right to fair trial]; *People v. Lindberg* (2008) 45 Cal.4th 1, 26 [quoting *Kraft* and rejecting appellant's claim that admission of evidence violated his constitutional rights to due process and fair trial]; *People v. Hall* (1986) 41 Cal.3d 826, 834 [application of ordinary rules of evidence does not infringe on defendant's constitutional right to present a defense].) Accordingly, we conclude that the trial court's proper application of California's rules of evidence in admitting the evidence at issue did not violate McDavid's constitutional rights. McDavid does not persuade us otherwise. *People v. Hall* (2018) 23 Cal.App.5th 576, cited by McDavid in support of his argument, is factually and procedurally inapposite. Unlike the trial court's pretrial ruling in this case, the trial court in *Hall* "definitively stated" in its pretrial ruling that it would not admit the defendant's misdemeanor conduct as impeachment evidence. (*Id*. at p. 590.) *Hall* concluded that the trial court's reversal of its prior definitive ruling and admission of that evidence after the defendant had begun testifying violated his right to testify, his right to counsel's assistance concerning whether to exercise his right to testify, and his right to a fair trial. (*Id*. at pp. 598-599.) Because in this case the trial court did not "definitively" rule that evidence of McDavid's two prior misdemeanor convictions and his involuntary separation from the Marine Corps was inadmissible and instead, stated that admission of that evidence would be subject to the

defense case presented at trial, *Hall* is inapposite to this case and does not persuade us that McDavid's constitutional rights were violated.[6] (*Id*. at p. 590.)

II

Prosecutor's Closing Argument

McDavid contends that the prosecutor committed prejudicial misconduct by positing a hypothetical situation involving gang members in the portion of her closing argument regarding self-defense. In particular, he argues that there was no evidence to support the prosecutor's argument that the jury could infer that he provoked a confrontation with Mulvihill in order to shoot him and then claim self-defense. He also argues that the prosecutor erred by using a gang hypothetical to suggest that McDavid had a criminal disposition or bad character.

A

McDavid testified in his defense that he did not intend to shoot Mulvihill when he lured him to the secluded location. Rather, he decided to shoot only when he heard Mulvihill say that he had a gun. McDavid said that he aimed and fired only at Mulvihill's

---

6 Because we conclude that the trial court did not err by admitting evidence of McDavid's two prior misdemeanor convictions for carrying a concealed firearm and the reasons for his separation from the Marine Corps, we need not address his assertion that the admission of that evidence was prejudicial error. Nevertheless, if we had considered the issue of prejudicial error, we would have concluded that it is not reasonably probable that McDavid would have received a more favorable result at trial if the challenged evidence had been excluded and therefore there was no reversible error committed by the court. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

flashlight to take that tactical advantage away from Mulvihill because McDavid feared for his life.

In closing, McDavid's counsel argued that because McDavid knew that Mulvihill was a drug user and a convicted felon and that he owned a firearm, McDavid took his rifle with him in order to protect himself. His counsel argued: "McDavid heard someone yell, 'I have a gun.' McDavid attempted to take out the flashlight to regain the tactical advantage and not be shot himself. He wanted to go home to be with his son."

In her rebuttal closing, the prosecutor argued that the evidence showed that McDavid was not entitled to self-defense because he created the situation that purportedly required him to shoot at Mulvihill. In this regard, the prosecutor argued:

> "The need for self-defense can't be created by Mr. McDavid. So a person does not have the right to self-defense . . . if he or she provokes a fight or a quarrel with the intent to create an excuse to use force. [¶] So here's an example. One gang member goes into the other gang member's territory. Gang member A knows that gang member B has a gun on him. Gang member A goes into B's territory. And says, 'What's up?' And he knows gangbanger B's reaction is going to be to grab for his gun. So gang banger A pulls it out and shoots him. He was going for his gun. I just shoot him—I had to shoot him first. Right? [¶] You can't create a situation that you know is going to require you to use deadly force. You have an obligation to avoid that situation and not go to something like that. And you can see what kind of society we would have if that's the standard.
>
> "You also can't use self-defense to create a quarrel with the intent to create a real or apparent necessity of exercising self-defense. Same situation. Same two men, except for the other gangbanger doesn't actually have a gun. But I think—I'm going to say, I think maybe he might, because he's a gangbanger. I go up and I say, 'Hey, what's up?' And he starts to run. And I turn around, and I pull out a gun, and I shoot him. And I said, 'Hey, I thought he was going to go get a gun.' Self-defense can't be available to you like

> that. [¶] And you can imagine the absurdity if self-defense was available to Mr. McDavid."

The prosecutor proceeded to describe two other hypothetical situations in explaining how self-defense does not apply to a defendant who creates the situation that purportedly requires him or her to use self-defense. In one of the hypotheticals, the prosecutor described how a burglar could not break into a home and then shoot the homeowner in self-defense claiming that the homeowner was running to get a gun. In that scenario, the prosecutor argued, the homeowner, and not the burglar, had the right to self-defense. The prosecutor then argued that Mulvihill and Kovach, but not McDavid, had the right to self-defense in this case because McDavid was pointing an AR-15 at them and McDavid created the situation requiring the need to use a weapon.

In the final hypothetical, the prosecutor described a bank robber armed with a gun who enters a bank with no intent of harming anyone. The prosecutor then described a scenario in which "out of the corner of his eye, he sees the security guard starting to reach for his gun. So the robber then turns and shoots and kills the security guard. And says, "Sorry, I thought he was reaching for his gun. I thought he was going to shoot me, so I had to shoot him first.' Can you see the absurdity of this? So Mr. McDavid is not entitled to self-defense under any circumstance." The prosecutor proceeded to describe the general principles of the law of self-defense and argued that McDavid was not entitled to self-defense in this case.

B

"A prosecutor's misconduct [or error] violates the Fourteenth Amendment to the United States Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct [or error] that does not render a trial fundamentally unfair nevertheless violates California law if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1202 (*Cole*).)

"When the issue 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citations.] Moreover, prosecutors 'have wide latitude to discuss and draw inferences from the evidence at trial,' and whether 'the inferences the prosecutor draws are reasonable is for the jury to decide.' " (*Cole, supra,* 33 Cal.4th at pp. 1202-1203.) A prosecutor may argue vigorously provided it is fair comment on the evidence, including reasonable inferences therefrom. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 396 (*Sassounian*).) A prosecutor also may make fair responses or rebuttal arguments to defense counsel's arguments. (*People v. Young* (2005) 34 Cal.4th 1149, 1192 (*Young*).)

Although a prosecutor is given wide latitude in vigorously arguing the People's case, the prosecutor may not misstate the law or evidence or refer to facts not in evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 828; *People v. Bell* (1989) 49 Cal.3d 502, 538

(*Bell*); *People v. Bandhauer* (1967) 66 Cal.2d 524, 529.) The prosecutor "has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the conclusions are illogical because these are matters for the jury to determine." (*People v. Thomas* (1992) 2 Cal.4th 489, 526.)

Arguments of a prosecutor must be considered in the context in which they are made. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21 (*Gonzalez*).) When an appellant "singles out words and phrases, or at most a few sentences, to demonstrate [prosecutorial] misconduct [or error], we must view the statements in the context of the [prosecutor's] argument as a whole." (*People v. Dennis* (1998) 17 Cal.4th 468, 522 (*Dennis*); see also *People v. Lucas* (1995) 12 Cal.4th 415, 475 (*Lucas*) ["Viewing the [prosecutor's] statements in the context of the argument as a whole [citation], we do not believe the prosecutor argued that the jury should disregard the law on the defense of unconsciousness. Moreover, viewing the challenged statements in context, we do not believe there is a reasonable likelihood that the jury understood him to be making such an argument."].)

Important for this case, a prosecutor may use hypotheticals to describe the application of law to certain factual scenarios. In one case, "[i]n order to illustrate [a principle of law], the prosecutor compared the facts of the case with common, obviously hypothetical scenarios that jurors readily could posit for themselves." (*People v. Mendoza* (2016) 62 Cal.4th 856, 907 (*Mendoza*).) *Mendoza* concluded that the

prosecutor in that case did not err by using such hypotheticals, stating: "The use of hypotheticals is not forbidden and there is no [prosecutorial] misconduct when, as here, ' "[n]o reasonable juror would have misunderstood the expressly hypothetical examples to refer to evidence outside the record." ' [Citation.]" (*Ibid*., quoting *People v. Davis* (1995) 10 Cal.4th 463, 538 (*Davis*).)

Absent a fundamentally unfair trial under the federal Constitution, prosecutorial misconduct or error does not require reversal of the judgment unless it was prejudicial under state law, i.e., it is reasonably probable that the defendant would have obtained a more favorable verdict absent the misconduct or error. (*Bell*, *supra*, 49 Cal.3d at pp. 534, 542; *People v. Castillo* (2008) 168 Cal.App.4th 364, 386; *People v. Crew* (2003) 31 Cal.4th 822, 839.) If the prosecutorial misconduct or error renders the defendant's trial fundamentally unfair under the federal Constitution, reversal of the judgment is required unless the misconduct or error is harmless beyond a reasonable doubt. (*Castillo*, at pp. 386-387, fn. 9; *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1323-1324.)

C

Based on our review of the record, we conclude that, considering the prosecutor's closing rebuttal argument as a whole, the prosecutor did not err by using the gang hypothetical scenario that McDavid challenges to argue that McDavid was not entitled to use self-defense based on the evidence in this case. The trial court instructed the jury on the principles of self-defense with CALCRIM No. 505 on reasonable or justifiable self-defense and CALCRIM No. 604 on imperfect self-defense. The court also instructed with CALCRIM No. 3472, as follows:

> "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force.
>
> "Self-defense may not be invoked by a defendant who, through his own wrongful conduct, has created circumstances under which his adversary's attack or pursuit is legally justified. Imperfect self-defense also cannot be invoked under such circumstances.
>
> "The People have the burden of proving beyond a reasonable doubt that defendant did not act in self-defense."[7]

In rebuttal closing argument, the prosecutor, as described *ante*, used three hypothetical scenarios to explain how CALCRIM No. 3472 applies to a situation in which the defendant created the circumstances that purportedly caused him to use force to defend himself or herself. McDavid concedes that the prosecutor's hypotheticals correctly described the law of reasonable self-defense and imperfect self-defense. However, McDavid argues that there was no evidence to support a reasonable inference that he provoked a confrontation with Mulvihill in order to shoot him and then claim self-defense.[8] We disagree.

Based on the evidence described *ante*, the jury could have reasonably inferred that McDavid was hired by Lovejoy to kill Mulvihill and that the two of them agreed on a plan whereby McDavid would lure Mulvihill to a secluded location and then shoot him.

---

[7] McDavid does not contend on appeal that the trial court erred by so instructing the jury.

[8] McDavid's instant contention on appeal is inconsistent with his trial counsel's failure to object below to CALCRIM No. 3472 on grounds that there was insufficient evidence to support it.

The evidence supports a reasonable inference that McDavid lured Mulvihill to a secluded location at night and lay prone with his AR-15 weapon, waiting for Mulvihill to arrive. On his arrival with Kovach, Mulvihill had a bright flashlight that he used to scan the area and shined it toward McDavid. After Mulvihill or Kovach yelled, "[h]e's got a gun" or "run," and began to run away, McDavid shot Mulvihill in the armpit. At trial, McDavid testified that Mulvihill yelled, "I've got a gun," which put McDavid in fear for his life. However, he intended to shoot only Mulvihill's flashlight and thereby take away Mulvihill's tactical advantage. In so doing, McDavid testified, in effect, that he acted in self-defense when he shot toward Mulvihill.

Although the evidence presumably could support an inference that McDavid did not initially intend to shoot Mulvihill and shot toward Mulvihill only out of concern for McDavid's own safety (i.e., he acted in reasonable self-defense or imperfect self-defense), the evidence also supported a contrary reasonable inference that McDavid initially intended to shoot Mulvihill and, after his shot failed to kill Mulvihill, McDavid contrived a story in order to claim self-defense, i.e., that Mulvihill said, "I've got a gun," and in fear for his own safety, McDavid aimed solely at Mulvihill's flashlight to take away his tactical advantage. It was in regard to the latter reasonable inference from the evidence that the prosecutor used the three hypothetical situations to argue in rebuttal that McDavid was not entitled to self-defense under CALCRIM No. 3472.

By arguing that the evidence supported a reasonable inference that McDavid did not act in reasonable self-defense or imperfect self-defense, the prosecutor did not err. The prosecutor had wide latitude to discuss and draw reasonable inferences from the

evidence at trial and to fairly and vigorously comment on the evidence. (*Cole*, *supra*, 33 Cal.4th at pp. 1202-1203; *Sassounian*, *supra*, 182 Cal.App.3d at p. 396.) Further, the prosecutor properly used the three hypothetical situations, described *ante*, to explain how the law of self-defense applies under CALCRIM No. 3472 to circumstances in which a shooter creates the situation leading to a shooting and thereafter claims self-defense. To illustrate the law of self-defense, the prosecutor compared the facts of this case with "obviously hypothetical scenarios that jurors readily could posit for themselves." (*Mendoza*, *supra*, 62 Cal.4th at p. 907; *Davis*, *supra*, 10 Cal.4th at p. 538.) Because no reasonable juror would have misunderstood the three expressly hypothetical examples to refer to evidence outside the record, we conclude that the prosecutor did not err by using those hypotheticals. (*Mendoza*, at p. 907; *Davis*, at p. 538.) In particular, contrary to McDavid's assertion, the prosecutor's use of the gang hypothetical did not liken McDavid to, or paint him as, a gang member or a person of bad character, but simply illustrated the law of self-defense in a hypothetical scenario that could not be confused with the evidence in this case and that was in accord with CALCRIM No. 3472, which the trial court gave without objection. (*Mendoza*, at p. 907; *Davis*, at p. 538.)

We conclude that the prosecutor did not err or commit any misconduct by using the gang hypothetical in her closing argument.[9]

---

9 Because we dispose of McDavid's contention on its merits, we need not address his additional assertions that he did not forfeit his contention, was denied effective assistance of counsel when his counsel did not object to the prosecutor's rebuttal argument, and was prejudiced by the prosecutor's error or by his counsel's deficient performance.

III

McDavid's Fines and Fees

McDavid contends that the trial court erred in sentencing him by imposing certain fines and fees without first finding that he had the ability to pay them.

A

At McDavid's sentencing on January 31, 2018, the court imposed a $10,000 restitution fine (Pen. Code, § 1202.4, subd. (b)); a $10,000 parole revocation fine (Pen. Code, § 1202.45, subd. (b)), which it suspended pending his successful completion of parole, if granted; an $80 court security fee (Pen. Code, § 1465.8); a $60 criminal conviction assessment fee (Gov. Code, § 70373); and a $150 criminal justice administration fee (Gov. Code, § 29550.1). McDavid did not object to the court's imposition of any of the fines or fees or request a hearing regarding his ability to pay them.

B

Citing *People v. Duenas* (2019) 30 Cal.App.5th 1157 (*Duenas*), McDavid argues that the trial court imposed the above fines and fees without any hearing on, or consideration by the court of, his ability to pay them, in violation of his due process rights. However, as the People assert, McDavid forfeited any challenge to those fines and fees by not timely objecting to their imposition and/or requesting a hearing on his ability to pay them. (See *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033 (*Gutierrez*); *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154 (*Frandsen*); *People v. Jenkins* (2019) 40 Cal.App.5th 30, 40-41, rev. gr. Nov. 26, 2019, S258729 [defendant had

statutory right to object to imposition of $9,700 of $10,000 maximum fine on the ground of inability to pay and his failure to so object resulted in forfeiture of his *Duenas* claim that all of the fines and fees imposed without a hearing on his ability to pay violated his right to due process].) Ordinarily, a defendant who fails to object to the imposition of a fine or fee in the trial court may not raise a claim pertaining to that fine or fee on appeal. (See, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864 [appellate forfeiture rule applies to probation fines and attorney fees imposed at sentencing]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [forfeiture rule applies to defendant's claim that restitution fine under former § 1202.4 was unauthorized sentence based on his inability to pay]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [defendant forfeited claim that trial court erred by failing to consider ability to pay restitution fine].)

Section 1202.4, subdivision (c) expressly permitted McDavid to challenge a restitution fine in excess of the $300 minimum fine based on his inability to pay. That statute provides in part: "The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. *Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum fine . . . .*" (§ 1202.4, subd. (c), italics added.) In this case, as in *Gutierrez* and *Frandsen*, the trial court imposed the maximum $10,000 restitution fine without any objection by McDavid. Therefore, even if *Duenas* was unforeseeable as McDavid asserts, we conclude that McDavid forfeited any challenge to the $10,000 section 1202.4, subdivision (b)

restitution fine because he failed to object to imposition of that fine based on an inability to pay that fine. Based on the same reasoning, we likewise conclude that he forfeited any challenge to the $10,000 section 1202.45, subdivision (b) parole revocation fine that the trial court imposed, but suspended. Finally, by not requesting a hearing on his ability to pay, we conclude McDavid forfeited any challenges to the $60, $80, and $150 court fees imposed by the court. (Cf. *People v. McCullough* (2013) 56 Cal.4th 589, 592-593, 599 [defendant forfeited challenge to booking fee by not requesting hearing on his ability to pay]; *Gutierrez, supra*, 35 Cal.App.5th at p. 1033 [defendant also forfeited challenge to additional $1,300 in fees imposed by court by not requesting hearing on his ability to pay $10,000 restitution fine].)

McDavid argues that if he forfeited his challenge to the above restitution fines because his trial counsel failed to object based on his inability to pay them, he was necessarily denied his Sixth Amendment right to effective assistance of counsel. To establish ineffective assistance of counsel, McDavid must show that: (1) his counsel's performance was deficient (i.e, fell below an objective standard of reasonableness under prevailing professional norms); and (2) his counsel's performance was prejudicial (i.e., it is reasonably probable that, absent such deficient performance, the result at trial would have been more favorable to him). (*Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*).) McDavid bears the burden on appeal to show both his counsel's deficient performance and prejudice, by a preponderance of the evidence. (*People v. Mayfield* (1997) 5 Cal.4th 142, 199.) However, a claim of ineffective assistance of counsel may not be raised on appeal unless either: (1) the record on appeal shows why counsel acted

or failed to act; or (2) the record shows there could be no satisfactory explanation or possible tactical reason for counsel's action or inaction. (*People v. Anderson* (2001) 25 Cal.4th 543, 569; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 (*Mendoza Tello*).) If neither of those exceptional circumstances applies, then the claim of ineffective assistance of counsel is more appropriately raised and decided in a habeas corpus proceeding. (*Mendoza Tello*, at pp. 266-267.) The record does not show why McDavid's counsel did not object to the imposition of the two $10,000 fines based on an inability to pay. Further, contrary to McDavid's assertion, we cannot conclude that there could have been no satisfactory explanation or possible tactical reason for his counsel's failure to object to those fines. Rather, as the People suggest, it is possible that his counsel did not object to those fines because an objection would have been futile in light of evidence that would have shown McDavid's ability to pay the fines. We reject McDavid's conclusory assertion that the record demonstrates that he is unable to pay the fines. Because his ineffective assistance of counsel claim is more appropriately raised in a habeas corpus proceeding, we decline to address its merits in this appeal. (Cf. *Mendoza Tello*, at pp. 266-268.)

IV

Section 12022.53, subdivision (d) Enhancement

In a supplemental letter brief, McDavid contends that the trial court erred by failing to exercise its discretion under section 12022.53, subdivision (h) to strike the jury's true findings on the section 12022.53, subdivision (d) allegations that in committing the conspiracy to commit murder (count 1) and premeditated attempted

murder (count 2), he personally used a firearm causing great bodily injury.[10] He argues that because the record affirmatively shows that the court was unaware of its discretion to strike those enhancements, the matter must be remanded for the court to decide whether to exercise that discretion. The People filed a responsive letter brief, opposing McDavid's contention and arguing that McDavid forfeited this contention by not raising it in the trial court and, in any event, the record does not affirmatively show that the court was unaware of its discretion under section 12022.53, subdivision (h) to strike those allegations.

A

Section 12022.53 provides for sentence enhancements for defendants who personally use a firearm in committing specified felony offenses, including any felony that is punishable by death or imprisonment for life. (§ 12022.53, subd. (a).) Section 12022.53, subdivision (d) provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), . . . personally and intentionally discharges a firearm and proximately causes great bodily injury, as

---

10 On April 14, 2020, we sent the parties a letter inviting them to submit supplemental letter briefs addressing the impact, if any, of amended section 12022.53, subdivision (h) on the issues in this case. McDavid and the People submitted supplemental briefs on this issue and we have reviewed and considered their briefs. Although McDavid's supplemental brief addresses only the section 12022.53, subdivision (d) enhancement related to count 1, we consider his argument to be equally applicable to the section 12022.53, subdivision (d) enhancement related to count 2. As noted *ante*, at McDavid's sentencing, the court imposed and executed a section 12022.53, subdivision (d) enhancement related to his conviction for conspiracy to commit murder and imposed, but pursuant to section 654 stayed execution of, a section 12022.53, subdivision (d) enhancement related to his conviction for premeditated attempted murder.

defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

Prior to January 1, 2018, former section 12022.53, subdivision (h) provided: "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." Therefore, under former section 12022.53, subdivision (h), imposition of a consecutive term of 25 years to life was mandatory if an allegation under section 12022.53, subdivision (d) was found to be true. Effective January 1, 2018, Senate Bill No. 620 (Stats. 2018, ch. 682, § 1), amended section 12022.53, subdivision (h) to permit the striking of a firearm enhancement under section 12022.53. Amended section 12022.53, subdivision (h) now provides: "The court *may, in the interest of justice pursuant to Section 1385* and at the time of sentencing, *strike or dismiss an enhancement* otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Italics added.) In *People v. Chavez* (2018) 22 Cal.App.5th 663, we concluded that "amended section 12022.53, subdivision (h), applies to all nonfinal judgments." (*Id*. at p. 712.)

B

"Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court." (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) "[A]n erroneous understanding by the trial court of its discretionary

power is not a true exercise of discretion." (*People v. Marquez* (1983) 143 Cal.App.3d 797, 803.) Alternatively stated, "[a] court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (*Belmontes*, at p. 348, fn. 8.)

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion. [Citation.]" (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228 (*Brown*).) "[A] ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law. [Citations.]" (*People v. Penoli* (1996) 46 Cal.App.4th 298, 302.) "Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal. [Citations.]" (*Id*. at p. 306.) "Where . . . a sentence choice is based on an erroneous understanding of the law, the matter must be remanded for an informed determination." (*People v. Downey* (2000) 82 Cal.App.4th 899, 912.)

"Remand for resentencing is not required, however, if the record demonstrates the trial court was aware of its sentencing discretion" or "if the record is silent concerning

whether the trial court misunderstood its sentencing discretion. Error may not be presumed from a silent record." (*Brown*, *supra*, 147 Cal.App.4th at pp. 1228-1229.) In contrast, "where the record *affirmatively* discloses that the trial court *misunderstood* the scope of its discretion, remand to the trial court is required to permit that court to impose sentence with full awareness of its discretion . . . ." (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944 (*Fuhrman*).)

C

Prior to McDavid's sentencing, which was scheduled for January 31, 2018, the probation department filed its probation report, dated December 12, 2017. The probation report recommended that the trial court deny McDavid probation and impose a term of 25 years to life in prison for his conviction on count 1and a consecutive term of 25 years to life in prison for the section 12022.53, subdivision (d) enhancement. In so doing, the probation report stated: "The punishment for the Allegation of [section] 12022.53(d) . . . is 25 years to Life to run consecutive to Count 1." The probation report made no mention of the upcoming change in section 12022.53, subdivision (h) that would give the court discretion to strike the section 12022.53, subdivision (d) enhancements.

In his statement in mitigation filed on December 5, 2017, McDavid's trial counsel argued only that the court should grant McDavid probation. In so doing, he appears to have indirectly referred to the section 12022.53, subdivision (d) enhancement while stating that McDavid was ineligible for probation. McDavid's counsel did not state any position as to what sentence McDavid should receive if the court were to deny probation, and did not request that the court strike the section 12022.53, subdivision (d)

enhancement under newly amended section 12202.53, subdivision (h), which would have resulted in a sentence of 25 years to life, rather than the 50 years to life that the court imposed.

At the January 31, 2018 sentencing hearing, the trial court stated that it had read and considered the probation report and the statement in mitigation filed by McDavid's counsel. The court found that McDavid was statutorily ineligible for probation, citing sections 1203.06, subdivision (a)(1)(A) and 12022.53, subdivision (g). The court stated: "[I]t was found true that [McDavid] personally used a firearm in the attempted commission of murder and personally discharged a firearm causing great bodily injury. [¶] Also under the facts of this case, it would not be appropriate to strike those true findings and to make him eligible for probation if the Court could do so. Therefore, probation is denied." The court proceeded to impose a term of 25 years to life in prison for the conviction on count 1, a consecutive term of 25 years to life in prison for the related section 12022.53, subdivision (d) enhancement, and a three-year term for the related section 12022.7, subdivision (a) enhancement, which the court stayed pursuant to section 654, for an aggregate term of 50 years to life in prison. The court also imposed, but pursuant to section 654 stayed execution of, a term of 25 years to life on count 2, a consecutive term of 25 years to life for the related section 12022.53, subdivision (d) enhancement, and a three-year term for the related section 12022.7, subdivision (a) enhancement.

D

McDavid asserts that because the record affirmatively shows that the trial court was unaware of its discretion under newly amended section 12022.53, subdivision (h) to strike the section 12022.53, subdivision (d) enhancements, we must remand the matter to permit the court to exercise its discretion as to whether to strike those enhancements. Assuming arguendo that McDavid forfeited that argument by not timely raising it during the sentencing hearing (see, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 353), we nevertheless exercise our inherent discretion to consider this issue on its merits. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 ["An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. [Citations.] Indeed, it has the authority to do so. . . . Whether or not it should do so is entrusted to its discretion."].)

Addressing the merits of McDavid's contention, we agree with him that the record affirmatively shows that the trial court was unaware of its discretion under newly amended section 12022.53, subdivision (h) to strike the section 12022.53, subdivision (d) enhancements. We therefore remand the matter for the court to conduct a resentencing hearing at which it shall exercise its discretion as to whether to strike those enhancements.

At the time of McDavid's sentencing on January 31, 2018, the amendment to section 12022.53, subdivision (h) had been in effect for only 31 days. Importantly, there is nothing in the record showing that any of the persons present at the sentencing hearing were aware of the recent amendment to section 12022.53, subdivision (h) granting the

court discretion under section 1385 to strike the section 12022.53, subdivision (d) enhancements. As discussed *ante*, the probation officer did not indicate in the probation report, which was prepared before the effective date of that amendment, that the court had any discretion to strike the section 12022.53, subdivision (d) enhancements. Further, by stating that the punishment for the firearm enhancement connected to count 1 "is 25 years to Life to run consecutive to Count 1," the probation report did not make the court aware of that new discretion but instead, impliedly informed the court that imposition of the 25 years to life sentence for the enhancement, consecutive to the sentence on count 1, was mandatory. McDavid's counsel also was apparently unaware of the recent amendment; he requested in his statement of mitigation only that the court grant McDavid probation, and did not request that the court strike the § 12022.53, subdivision (d) enhancements.

At the sentencing hearing, neither McDavid's counsel, the prosecutor nor the probation officer raised the issue that the trial court had discretion under newly amended section 12022.53, subdivision (h) to strike the section 12022.53, subdivision (d) enhancements. Further, there is nothing in the statements the court made during McDavid's sentencing that indicates that it was aware of that newly granted discretion. On the contrary, the record supports a reasonable inference that the court was, in fact, unaware of that discretion. As discussed *ante*, the court found that McDavid was statutorily ineligible for probation and denied him probation, citing sections 1203.06, subdivision (a)(1)(A) and 12022.53, subdivision (g). Section 1203.06, subdivision (a) provides that "probation shall not be granted to . . . (1) [a]ny person who personally used

a firearm during the . . . attempted commission of . . . (A) [m]urder." Similarly, section 12022.53, subdivision (g) provides "probation shall not be granted to . . . any person found to come within the provisions of this section [e.g., section 12022.53, subdivision (d)]." The court thus correctly found that the jury's true findings on the section 12022.53, subdivision (d) allegations precluded the court from granting McDavid probation. (See also, *People v. Centeno* (2019) 38 Cal.App.5th 572, 578-579 [although Sen. Bill No. 620 amended § 12022.53, subd. (h) to give trial courts discretion to strike sentence enhancements under § 12022.53, it did not amend § 1203.06 which continues to preclude courts from granting defendants probation if true findings are made on § 12022.53 allegations].) In denying McDavid probation, the court stated: "[I]t was found true that [McDavid] personally used a firearm in the attempted commission of murder and personally discharged a firearm causing great bodily injury. [¶] Also under the facts of this case, it would not be appropriate to strike those true findings and to make him eligible for probation *if the Court could do so*." (Italics added.) That statement indicates that the court would not have granted McDavid probation even if it were not precluded from doing so by sections 1203.06 and 12022.53, subdivision (g). By omitting any reference in that discussion to newly amended section 12022.53, subdivision (h) or its discretion thereunder to strike the section 12022.53, subdivision (d) enhancements, the court implicitly showed that it was unaware of its discretion to strike those enhancements. Alternatively stated, by stating that it did not have discretion to strike the section 12022.53, subdivision (d) enhancements in order to grant probation to McDavid without expressly noting its discretion under section 12022.53, subdivision (h) to strike those

enhancements for purposes of sentencing him, the court affirmatively showed that it was unaware of that sentencing discretion.

Another fact that leads us to conclude that the trial court was unaware of its discretion to strike the section 12022.53, subdivision (d) enhancements is the severity of the punishment for a section 12022.53, subdivision (d) enhancement—a consecutive term of 25 years to life in prison. If the court were, in fact, aware that it had discretion to strike such severe sentence enhancements, we would expect the court to have addressed on the record the possibility of striking them and its reasons for not exercising its discretion to do so, as it clearly did with respect to its denial of probation.

Contrary to the People's assertion, the record does not show that the trial court would not have exercised its section 12022.53, subdivision (h) discretion to strike the section 12022.53, subdivision (d) enhancements if it had been aware of that discretion. Instead, the record shows that the court may have stricken the section 12022.53, subdivision (d) enhancements if it had been aware of its discretion to do so under amended section 12022.53, subdivision (h). The evidence at trial supports reasonable inferences that Lovejoy was the originator and mastermind of the plan to kill Mulvihill and that she manipulated McDavid into committing the instant offenses. In fact, the prosecutor expressly asserted as much at Lovejoy's sentencing hearing, stating: "Ms. Lovejoy manipulated Mr. McDavid." Although that manipulation clearly does not excuse McDavid's criminal conduct, the court may have considered that factor in determining whether to exercise its discretion to strike the section 12022.53, subdivision (d) enhancements if it had been aware of its discretion to do so. Given Lovejoy's

recruitment and manipulation of McDavid, as well as other circumstances (e.g., McDavid's lack of serious criminal history, his military history, etc.), the court might have concluded that the imposition of a total prison term for McDavid (i.e., 50 years to life) that was nearly twice the total prison term imposed on Lovejoy (i.e., 26 years to life) was not appropriate under the circumstances and exercised its discretion to strike those enhancements, thereby imposing essentially equivalent sentences on McDavid and Lovejoy.

Because the record affirmatively shows that the trial court was unaware of its discretion under section 12022.53, subdivision (h), we conclude that the appropriate remedy is to remand the matter to the trial court for the court to conduct a new sentencing hearing at which it shall exercise its discretion as to whether to strike the section 12022.53, subdivision (d) enhancements. (See *Fuhrman*, *supra*, 16 Cal.4th at p. 944 ["where the record *affirmatively* discloses that the trial court *misunderstood* the scope of its discretion, remand to the trial court is required to permit that court to impose sentence with full awareness of its discretion"].) We express no opinion regarding how the trial court should exercise that discretion on remand.

LOVEJOY'S APPEAL

V

Prosecutor's Closing Argument on Lovejoy's Motive to Kill

In her appeal, Lovejoy contends that the prosecutor committed prejudicial misconduct by arguing in her rebuttal closing that Lovejoy would gain financially if Mulvihill were dead, thus giving Lovejoy a motive to kill him. In particular, Lovejoy

argues that the prosecutor erred by changing her theory regarding Lovejoy's motive to kill Mulvihill from a "debt animosity" theory, during her initial closing argument to a "debt avoidance" theory, during her rebuttal closing argument, thereby depriving Lovejoy's counsel of an opportunity to respond to "debt avoidance" motive theory. Lovejoy argues in the alternative that if the prosecutor did not err in raising this argument, she was denied her constitutional right to effective assistance of counsel because her trial counsel failed to present evidence demonstrating that Lovejoy would not gain financially if Mulvihill were killed.

A

During trial, there was evidence admitted showing that on June 26, 2016, Lovejoy and Mulvihill entered into a marital settlement agreement as part of their divorce. Pursuant to the settlement agreement, Lovejoy was obligated to pay Mulvihill a community property equalization payment of $120,000 by September 25, 2016 (i.e., 90 days after the date of the agreement), from either refinancing their community residence or from the proceeds of the sale of a condominium unit separately owned by Lovejoy.

During the prosecutor's initial closing argument, the prosecutor discussed Lovejoy's possible motives for wanting Mulvihill dead. First, the prosecutor discussed the marital acrimony between Lovejoy and Mulvihill that began in 2014 and Lovejoy's false accusations against Mulvihill that initially allowed her to obtain sole custody of their son and required Mulvihill to pay her child support. The prosecutor described how Mulvihill ultimately prevailed by refuting Lovejoy's false accusations and that Lovejoy

was thereafter required to share custody of their son with Mulvihill and pay him child support.

The prosecutor also twice referred to Lovejoy's $120,000 obligation in her initial closing, arguing first: "And the worst insult of it all is at the end of their divorce, she has to give him $120,000. [¶] We know that none of this was satisfactory to Ms. Lovejoy because she set about looking for someone that would kill Mr. Mulvihill and get rid of all of her woes." The prosecutor later posed to the jury the question whether Lovejoy knew that McDavid intended to kill Mulvihill and answered that question, arguing: "Well, of course. He's doing it on her behalf." The prosecutor then argued that McDavid had "nothing personal against Mr. Mulvihill. He's doing it because—probably for 120,000 reasons he's doing it and because of his sexual relationship with her."

During her initial closing argument, the prosecutor also generally described how the evidence showed that Lovejoy and McDavid had planned the killing of Mulvihill, found a secluded location, and used a "burner phone" to lure Mulvihill to the location where McDavid shot him.

Lovejoy's attorney did not object to any of the references that the prosecutor made to the $120,000 payment in her initial closing argument.

In his closing argument, Lovejoy's counsel argued that Lovejoy and McDavid had no motive to kill Mulvihill because neither one had any significant financial pressures. Her counsel also argued that the testimony of Clark, Lovejoy's aunt, showed that about three weeks before the shooting, Lovejoy was happy about her marital settlement agreement and how cooperative Mulvihill had been. Lovejoy's counsel also described

how Lovejoy would have to pay Mulvihill the settlement amount in 90 days and noted that she had accepted an offer on the sale of her condominium that would close by the end of September. Lovejoy's counsel addressed CALCRIM No. 370 regarding motive as a factor for the jury's consideration, arguing: "Having a motive may be a factor tending to show a defendant is guilty. Not having a motive may be a factor tending to show a defendant is not guilty." He argued: "You, as jurors, need to look at the progression of things from December [2015] to September 2016. And when you look at the uncontradicted facts of everything that has gone on during that time, there is 100 percent no motive to murder Mr. Mulvihill."

In rebuttal closing argument, the prosecutor responded to the argument by Lovejoy's counsel that Lovejoy and McDavid had no motive to kill Mulvihill, referring three times to Lovejoy's obligation to pay $120,000 to Mulvihill. First, the prosecutor argued that the evidence showed that Lovejoy was not, in fact, happy with the settlement agreement. The prosecutor reasoned that if Lovejoy were truly happy and the jury were to accept her version of events, she would not have hired McDavid to try to find evidence about Mulvihill molesting their son. The prosecutor argued: "It is still obvious that she's . . . not at all happy with the way the settlement is coming down. And there is urgency to do this crime now because you can't do it right on the eve of the $120,000. So it's got to be at least somewhat removed in time. And that's why that date was selected."

Second, the prosecutor argued that McDavid's testimony that he spontaneously selected September 1, 2016, as the date to lure Mulvihill to the secluded location was not credible. She argued: "Really, why did you go there the day before? He testified that he

went to the scene the day before. If this was a spontaneous thing, why did you go the day before?" The prosecutor answered her own question, arguing: "The $120,000 payment. He wants you to think is irrelevant? That is obviously not true."

Third, countering the argument by Lovejoy's counsel that Lovejoy and McDavid had no motive to kill Mulvihill, the prosecutor argued: "No reason to kill[?] They had 120,000 reasons to kill." Neither Lovejoy's nor McDavid's counsel objected to any of the remarks that the prosecutor made about the $120,000 payment during her rebuttal closing argument.

On Thursday, November 9, 2017, jury deliberations began and continued for about one hour. Jury deliberations resumed the following Monday, November 13. Shortly after deliberations resumed, Lovejoy's counsel objected to the prosecutor's rebuttal closing argument that Lovejoy had a $120,000 motive to kill Mulvihill based on the marital settlement agreement. Stating that he had been taken by surprise by that argument, Lovejoy's counsel asked the court to reopen the case so that he could present additional evidence, and requested that the court either take judicial notice that the settlement agreement was binding on all parties, or instruct the jury that the prosecutor's argument concerning the $120,000 was not accurate or supported by law. He argued that because the marital settlement agreement was enforceable, Lovejoy "wasn't in a position to gain that $120,000 back." By so arguing, Lovejoy's counsel was presumably making the point that even if Mulvihill died, Lovejoy nevertheless would be obligated to make the payment to Mulvihill's estate.

The court explained that, in its view, the money would have gone to their child if Mulvihill had died, but that Lovejoy would have had control of it as his mother. The court stated: "If [Lovejoy's] intent was to have [Mulvihill] killed, then that money which goes to Mr. Mulvihill's estate goes to the child. And she's the child's mother and guardian, so she has control over that. [¶] . . . [I]t's a distinction without a real difference in the idea of a motive. . . . [I]t just would confuse the jury to bring in something that would not have a major impact on them." The court therefore denied the relief requested by Lovejoy's counsel. The jury returned its verdicts shortly thereafter, finding Lovejoy guilty on counts 1 and 2.

Lovejoy filed a motion for new trial, asserting that the prosecutor had improperly argued in rebuttal closing a new theory of a monetary or "debt-avoidance" motive by the defendants—a theory that, according to the motion, the prosecutor had represented prior to trial that she would not raise. The prosecutor opposed the motion, arguing, inter alia, that she had simply argued in closing that Lovejoy did not want to give the money *to Mulvihill* because she despised him and therefore, new testimony by a family law attorney regarding the financial impact of the marital settlement agreement would not have changed anything. The court rejected Lovejoy's assertion that the prosecutor had represented that she would not assert the $120,000 payment, as required by the marital settlement agreement, as a motive. The court noted that the entire marital settlement agreement was in evidence, including its provision that Lovejoy was obligated to make the $120,000 equalization payment. The court rejected Lovejoy's assertion that the prosecutor had disavowed until her rebuttal closing argument that she would assert the

$120,000 equalization payment as a motive, noting that the prosecutor had raised that issue prior to trial, presented the settlement agreement, including its $120,000 equalization payment provision, as evidence during the trial, and cross-examined McDavid about the $120,000 payment that Lovejoy was obligated to make to Mulvihill. Accordingly, the court denied Lovejoy's motion for new trial.

B

Assuming arguendo that Lovejoy did not forfeit this claim by her counsel's failure to timely object and request a curative admonition, we reject Lovejoy's argument on appeal that the prosecutor argued one motive theory, "debt animosity," in her initial closing argument and a different motive theory, "debt avoidance," in her rebuttal closing, with respect to the $120,000 equalization payment.[11]

We glean from Lovejoy's briefing on appeal that the prosecutor's purported "debt animosity" motive theory, argued in her initial closing argument, was that because Lovejoy was angry that she had to pay the $120,000 equalization amount specifically *to Mulvihill* by the end of September 2016, she wanted Mulvihill killed before that date.

---

11 Lovejoy does not challenge on appeal the prosecutor's remarks in her initial closing arguments that, according to Lovejoy, suggested that Lovejoy had a "debt animosity" motive to kill Mulvihill, i.e., that she conspired and attempted to kill Mulvihill because "she was so angry at having to pay money to Mulvihill that she wanted him killed." Rather, her contention on appeal is that the prosecutor *changed her theory* with respect to Lovejoy's motive for wanting Mulvihill dead from a "debt animosity" theory discussed in the prosecutor's initial closing argument, to a "debt avoidance" theory, i.e., that Lovejoy would gain financially if Mulvihill were dead because she would not have to pay him the $120,000, purportedly argued in the prosecutor's rebuttal closing argument (a theory that Lovejoy contends is unsupported factually or legally), thereby depriving Lovejoy's counsel of the opportunity to respond to the "debt avoidance" argument.

The "debt avoidance" motive theory, purportedly argued in rebuttal closing argument, is that Lovejoy wanted Mulvihill dead because she wanted to avoid paying the $120,000 and instead, keep that money for herself, thereby having a motive of financial gain.

Contrary to Lovejoy's assertion on appeal, the prosecutor's references in her rebuttal closing argument to the $120,000 payment, as quoted *ante*, do *not* show that the prosecutor changed her motive theory with respect to the $120,00 payment from a "debt animosity" motive to a "debt avoidance" motive. Rather, the references in the prosecutor's rebuttal argument to the $120,000 payment are consistent with the prosecutor's initial argument with respect to Lovejoy's motives. As the People assert, with respect to the $120,000 payment, the prosecutor consistently argued at trial that Lovejoy's having to make the $120,000 payment *to Mulvihill* provided a motive for her to want Mulvihill dead. As discussed *ante*, in her initial closing argument, the prosecutor referred to Lovejoy's anger about having to pay Mulvihill the $120,000, arguing: "And the *worst insult* of it all is at the end of their divorce, *she has to give him $120,000*. [¶] We know that none of this was satisfactory to Ms. Lovejoy because she set about looking for someone that would kill Mr. Mulvihill and get rid of all of her woes." (Italics added.) In addressing McDavid's motive to kill Mulvihill, the prosecutor again referred to the $120,000 amount, arguing: "He's doing it on her behalf" and "has nothing personal against Mr. Mulvihill. He's doing it because—probably *for 120,000 reasons* he's doing it and because of his sexual relationship with her." (Italics added.)

In rebuttal closing argument, the prosecutor's references to the $120,000 amount did not vary from the prosecutor's theory argued in her initial closing argument.

Countering the closing argument by Lovejoy's counsel that Lovejoy was happy with her marital settlement agreement with Mulvihill, the prosecutor in rebuttal closing argued that the evidence showed that Lovejoy was not, in fact, happy with the settlement agreement. The prosecutor further argued that because Lovejoy was not happy with the agreement, "there is urgency to do this crime now because you can't do it right *on the eve of the $120,000*. So it's got to be at least somewhat removed in time. And that's why that date was selected." (Italics added.) In context, the prosecutor's reference to the $120,000 payment addressed the *timing* of the attempted murder and not Lovejoy's motive, directly. The prosecutor argued, in effect, that because Lovejoy was angry about having to pay Mulvihill the $120,000 amount and intended to kill him based on that anger, she had to kill him at a time when it would not so obviously connect her with the killing. Accordingly, that reference by the prosecutor to the $120,000 payment was consistent with her initial closing argument and does not demonstrate a change from a "debt animosity" motive theory to a "debt avoidance" motive theory, as Lovejoy maintains.

The prosecutor later argued in rebuttal closing that McDavid's testimony that he had spontaneously selected September 1, 2016, as the date to lure Mulvihill to the secluded location was not credible, noting that the evidence showed that McDavid had gone to the secluded location on the day before the shooting. In particular, the prosecutor argued that the fact that McDavid went to the location on the day before the shooting, and "[t]he *$120,000 payment*," demonstrated that McDavid had not spontaneously picked September 1 as the date to shoot Mulvihill. (Italics added.) By so referring to the $120,000 payment, the prosecutor, in effect, incorporated into her rebuttal argument the

comments that she made in her initial closing argument, discussed *ante*, in which she argued that McDavid intended to kill Mulvihill based on his relationship with Lovejoy.

In the prosecutor's third and final reference to the $120,000 amount in her rebuttal closing, the prosecutor again countered the argument by Lovejoy's counsel that there was no motive for Lovejoy and McDavid to kill Mulvihill, arguing: "No reason to kill[?] They had *120,000 reasons to kill*." (Italics added.) Thus, the prosecutor argued in both her initial closing argument and in her rebuttal closing argument, that, in effect, because Lovejoy was angry about having to pay Mulvihill the $120,000 amount, she had "120,000 reasons to kill" him. At no point in her closing arguments did the prosecutor argue to the jury that if Mulvihill were killed, Lovejoy would have been able to keep the $120,000 for herself.

Again, contrary to Lovejoy's assertion, none of the above references by the prosecutor to the $120,000 payment demonstrates that the prosecutor changed her theory regarding the $120,000 payment from her initial closing argument to her rebuttal closing, or that the prosecutor added a "debt avoidance" theory to a "debt animosity" theory. The trial judge, who was present through the entire trial and heard all of the evidence and arguments of counsel, rejected Lovejoy's argument that the prosecutor had unfairly surprised Lovejoy's counsel at trial through her remarks about the $120,000 payment made during her rebuttal closing.

The prosecutor fairly responded to the argument by Lovejoy's counsel that Lovejoy was happy with the martial settlement agreement and therefore, had no motive to kill Mulvihill, by arguing in her rebuttal closing that the evidence showed that Lovejoy,

in fact, had a motive to kill Mulvihill, i.e., she was angry about having to pay Mulvihill the $120,000. (*Sassounian*, *supra*, 182 Cal.App.3d at p. 396 [prosecutor may fairly comment on the evidence]; *Young*, *supra*, 34 Cal.4th at p. 1192 [prosecutor may fairly respond to defense counsel's arguments].) Because we must consider the prosecutor's arguments in the context in which they are made (*Gonzalez*, *supra*, 51 Cal.3d at p. 1224, fn. 21), and view the prosecutor's arguments as a whole, we cannot consider the prosecutor's references to the $120,000 payment in isolation and instead, consider them as part of the prosecutor's entire closing argument. (*Dennis*, *supra*, 17 Cal.4th at p. 522; *Lucas*, *supra*, 12 Cal.4th at p. 475.) Considering the prosecutor's arguments as a whole, we conclude that her references in her rebuttal closing to the $120,000 payment are

consistent with her comments in her initial closing and did not, as Lovejoy asserts, constitute a change in the prosecution's theory regarding Lovejoy's motive.[12]

C

Lovejoy alternatively argues that if the prosecutor did not err by referring in her rebuttal closing argument to the $120,000 payment, she nevertheless was denied her Sixth Amendment right to effective assistance of counsel because her trial counsel failed to present evidence in her defense case showing that she would not have gained, financially, if Mulvihill were killed. Lovejoy asserts that her primary defense theory at trial was that she did not have a motive to kill Mulvihill and her counsel had two experts

---

12 Because, as we concluded *ante*, the prosecutor's theory regarding Lovejoy's motive with respect to the $120,000 payment was consistent throughout her closing arguments, we need not, and do not, address the trial court's reasoning for its denial during jury deliberations of Lovejoy's requested relief (e.g., reopening the case to permit defense counsel to present evidence on her lack of a financial gain motive) or the court's denial of her motion for new trial *or* the prosecutor's arguments in opposing her requested relief and motion for new trial. Regardless of the trial court's reasons for its rulings during jury deliberations and in denying Lovejoy's motion for new trial, we conclude that the court correctly denied her requested relief because the prosecutor's references to the $120,000 payment were consistent throughout. (*People v. Jones* (2012) 54 Cal.4th 1, 50 [appellate court must affirm trial court's correct ruling even if its reasons were incorrect].) Further, Lovejoy has not persuaded us that the trial court abused its discretion by not reopening the case during jury deliberations to allow her to present evidence of her purported lack of a financial gain motive. As noted, Lovejoy's counsel argued in closing that Lovejoy and McDavid had no motive to kill Mulvihill because neither one had any significant financial pressures. The court could have concluded that Lovejoy's counsel's request was made too late in the proceedings (i.e., in the midst of jury deliberations), that she had not been diligent in presenting that evidence during trial, that the jury may be confused by that evidence and/or give it undue emphasis, and/or that the evidence that Lovejoy wanted to present would not have a significant impact on the jury's consideration of the case. (*People v. Jones* (2003) 30 Cal.4th 1084, 1111; *People v. Masters* (2016) 62 Cal.4th 1019, 1069.)

in enforcement of judgments and probate law who could have testified that she could not have received any financial gain on the death of Mulvihill. In particular, she asserts that those experts could have testified that if Mulvihill had been killed, she nevertheless would have been obligated to pay the $120,000 amount to his estate and any inheritance her son received from Mulvihill's estate would likely have been under the control of a guardian or custodian other than her. Lovejoy argues that because her trial counsel failed to present that evidence, she was denied her right to effective assistance of counsel.

A criminal defendant is constitutionally entitled to the effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland*, *supra*, 466 U.S. at pp. 684-685; *People v. Pope* (1979) 23 Cal.3d 412, 422 (*Pope*).) To establish a denial of the right to counsel, a defendant must show: (1) his or her counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance prejudiced the defendant. (*Strickland*, at pp. 687, 691-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*); *Pope*, at p. 425.) To demonstrate prejudice, a defendant must show that there is a reasonable probability that he or she would have received a more favorable result if his or her counsel's performance had not been deficient. (*Strickland*, at pp. 693-694; *Ledesma*, at pp. 217-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*People v. Williams* (1997) 16 Cal.4th 153, 215.) It is the defendant's burden on appeal to show that he or she was denied the effective assistance of counsel and is entitled to relief. (*Ledesma*, at p. 218.)

"In evaluating a defendant's claim of deficient performance by counsel, there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' [citations], and we accord great deference to counsel's tactical decisions. [Citations.] . . . Accordingly, a reviewing court will reverse a conviction on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' " (*People v. Frye* (1998) 18 Cal.4th 894, 979-980.) However, a court need not address the issue of whether a defendant's counsel performed deficiently before it addresses the issue of whether the defendant was prejudiced by that purported deficient performance. "If it is easier to dispose of an ineffectiveness claim on the ground of a lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland*, *supra*, 466 U.S. at p. 697; see also *In re Alvernaz* (1992) 2 Cal.4th 924, 945.)

Assuming arguendo that Lovejoy's counsel performed deficiently, as she asserts, we nevertheless conclude that she has not carried her burden on appeal to show that such deficient performance prejudiced her. (*Strickland*, *supra*, 466 U.S. at pp. 687, 691-692, 697; *Ledesma*, *supra*, 43 Cal.3d at pp. 216-217; *Pope*, *supra*, 23 Cal.3d at p. 425.) Based on our review of the record, we conclude that it is not reasonably probable that Lovejoy would have obtained a more favorable result at trial if her counsel had presented the

testimony of the two experts and/or other evidence showing that she would not have gained financially if Mulvihill were killed.[13]

As the People assert, Lovejoy has not submitted declarations from the two experts demonstrating what their purported testimony would have been if they had been called to testify by her counsel. In any event, assuming that the two experts would have persuasively testified that Lovejoy would not have gained financially from Mulvihill's death, i.e., that she would not have been able to keep the $120,000 that she was required to pay him pursuant to the marital settlement agreement, we nevertheless conclude that it is not reasonably probable that she would have obtained a more favorable verdict if her counsel had presented that evidence. First, the jury was instructed with CALCRIM No. 370 that Lovejoy's motive to kill Mulvihill was not an element of the offenses charged against her. Second, the prosecutor presented evidence about, and argued the existence of, three separate possible motives that Lovejoy could have had that supported a reasonable inference by the jury that she intended to kill Mulvihill. In particular, the prosecutor argued that Lovejoy was angry because she had to share custody of her son with Mulvihill, she had to pay Mulvihill child support, and she had to pay Mulvihill a

---

13 In her opening brief, Lovejoy argues: "Counsel could have called two experts in the field of enforcement of judgments and probate law and quickly disabused the jury of any notion that appellant could realize a financial gain by the death of her ex-husband." Her "two experts" apparently were Lauren Schmidt, Lovejoy's family law attorney, and an unnamed "Wilson trust attorney that my client had contacted." The record on appeal does not contain any declaration by either expert regarding the nature and substance of their purported expert testimony.

$120,000 equalization payment. The prosecutor did not argue that Lovejoy could avoid paying that amount if Mulvihill were killed.[14]

Finally, and most importantly, based on our independent review of the record, we conclude that the evidence of Lovejoy's guilt of the two offenses is overwhelming. As discussed *ante*, Lovejoy made false accusations against Mulvihill in order to obtain sole custody of her son. After those accusations were proven to be false and Mulvihill obtained shared custody of their son and child support from Lovejoy, Lovejoy asked Clark, her aunt, whether she knew anyone who could kill Mulvihill. When Clark told Lovejoy that she did not, Lovejoy recruited McDavid, her shooting instructor and sometime sexual partner, to lure Mulvihill to a secluded location at night and use his sharpshooting skills to kill him. In executing their plan, Lovejoy researched the date on which there would be a new moon, purchased a TracFone for McDavid to use in calling Mulvihill that night, met McDavid at a parking lot and drove him to the secluded location, and picked McDavid up after the shooting. Based on that compelling evidence

---

[14] To the extent that Lovejoy cites postverdict comments by two jurors regarding the $120,000 payment, those comments are irrelevant and do not show that Lovejoy was prejudiced by her counsel's purported deficient performance. Although we doubt that those jurors' comments have been properly made a part of the record on appeal, we nevertheless conclude that those comments do not support the interpretation that Lovejoy suggests. One juror apparently told a reporter that Lovejoy "didn't want to give $120,000 to her husband" and another juror apparently stated she personally believed "the motive was the money" and "believed $120,000 was playing into it, but I also think that she just had enough." While those comments demonstrate that these two jurors believed that Lovejoy was angry about having to pay $120,000 to Mulvihill, the comments are consistent with the prosecutor's remarks about the $120,000 made during closing arguments and do not show that the jurors believed that Lovejoy would gain financially if Mulvihill were killed.

showing Lovejoy's direct participation in recruiting McDavid to shoot Mulvihill, planning that shooting with McDavid, and assisting McDavid in executing their plan on the night of September 1, 2016, we conclude that it is not reasonably probable that Lovejoy would have obtained a more favorable result at trial if her counsel had presented evidence that she would not have been able to keep the $120,000 that she was required to pay Mulvihill if Mulvihill were killed. Because Lovejoy was not prejudiced by her counsel's purported deficient performance, we conclude that she was not denied her constitutional right to the effective assistance of counsel. (*Strickland*, *supra*, 466 U.S. at pp. 687, 691-692, 697; *Ledesma*, *supra*, 43 Cal.3d at pp. 216-217; *Pope*, *supra*, 23 Cal.3d at p. 425.)

VI

Senate Bill No. 1437

Lovejoy contends that her conviction for premeditated attempted murder must be reversed because Senate Bill No. 1437 amended Penal Code section 188, subdivision (a)(3), effective January 1, 2019, regarding the malice required for murder and the benefit of that amendment applies retroactively to her offense. Lovejoy argues that because her attempted murder conviction may have been based on a natural and probable consequences theory, Senate Bill No. 1437's provisions apply to require reversal of that conviction. As we explain *post*, the jury clearly found that Lovejoy had the intent to kill Mulvihill. The asserted instructional error was thus clearly not prejudicial and does not require reversal of her attempted murder conviction.

A

The Legislature enacted Senate Bill No. 1437, effective January 1, 2019, for the expressed purpose of "amend[ing] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, *to ensure that murder liability is not imposed on a person who* is not the actual killer, *did not act with the intent to kill*, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f), italics added.) Accordingly, Senate Bill No. 1437 amended section 188 regarding the degrees of murder and section 189 regarding the definition of malice for purposes of the offense of murder. (Stats. 2018, ch. 1015, §§ 2 & 3.) Amended section 188 provides: "Except as stated in subdivision (e) of Section 189, *in order to be convicted of murder, a principal in a crime shall act with malice aforethought*. Malice shall not be imputed to a person based solely on his or her participation in a crime." (Stats. 2018, ch. 1015, § 2, subd. (a)(3), italics added.) Amended section 189 provides that a participant in the perpetration, or attempted perpetration, of an underlying felony in which a death occurs, which provides the basis for a charge of first degree felony murder, may be liable for murder "only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, *with the intent to kill*, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (Italics added.)

In addition, Senate Bill No. 1437 added new section 1170.95, which permits a person with an existing conviction for felony murder or murder under the natural and probable consequences doctrine to petition the sentencing court to have the murder conviction vacated and to be resentenced on any remaining counts if he or she could not have been convicted of murder as a result of the other legislative changes implemented by Senate Bill No. 1437. (§ 1170.95, subd. (a).) Section 1170.95 provides that if the petitioner makes a prima facie showing of entitlement to relief, the court must issue an order to show cause and, absent a waiver and stipulation by the parties, hold a hearing to determine whether to vacate the murder conviction, recall the sentence, and resentence the petitioner. (§ 1170.95, subds. (c) & (d)(1).)

B

Lovejoy asserts that in addition to amending the malice required for a murder conviction, Senate Bill No. 1437 also implicitly modified accomplice liability for *attempted murder* because attempt requires at least the same mens rea as the completed crime.[15] The jury in this case was instructed on two possible theories of Lovejoy's liability for attempted murder—aiding and abetting attempted murder, and natural and probable consequences of a conspiracy to commit murder. Lovejoy argues that because a

---

15 This issue is currently pending before the California Supreme Court. (See, e.g, *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1104-1105 (*Lopez*) [Sen. Bill No. 1437's abrogation of natural and probable consequences doctrine does not apply to attempted murder charge], review granted Nov. 13, 2019, S258175; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1015 (*Medrano*) [Sen. Bill No. 1437's abrogation of natural and probable consequences doctrine applies to attempted murder charge], review granted Mar. 11, 2019, S259948.)

conviction for murder requires proof of malice, which cannot be imputed to a person based solely on participation in the target crime, the natural and probable consequences doctrine is no longer a valid basis for an attempted murder charge. Lovejoy maintains that Senate Bill No. 1437 implicitly repealed the natural and probable consequences doctrine as a basis for aider and abettor liability for attempted murder. Because, Lovejoy argues, the jury was erroneously instructed on the natural and probable consequences theory, the jury did not necessarily find that she had the intent to kill, as required for attempted murder liability and therefore, her conviction for that offense must be reversed.

Assuming, strictly for the purpose of addressing Lovejoy's argument, that Senate Bill No. 1437's provisions apply to attempted murder and that the court erred by instructing on the natural and probable consequences theory, we nevertheless conclude that any such instructional error was harmless beyond a reasonable doubt because the record clearly demonstrates that the jury found that Lovejoy intended to kill Mulvihill.

Importantly, the trial court instructed with modified CALCRIM No. 563 on conspiracy to commit murder, stating in part:

> "To prove that a defendant is guilty of [Count 1 conspiracy to commit murder], the People must prove that:
>
> "1. *The defendant* intended to agree and *did agree* with the other defendant *to intentionally and unlawfully kill*;
>
> "2. At the time of the agreement, *the defendant* and the other alleged member of the conspiracy *intended that one* or more of them *would intentionally and unlawfully kill*;
>
> "3. One of the defendants or both of them committed at least one of the following overt acts alleged to accomplish the killing: [list of 53 possible overt acts]; [¶] AND

> "4. At least one of these overt acts was committed in California. [¶] . . .
>
> "*To decide whether a defendant* and the other member of the conspiracy *intended to commit murder*, please refer to [CALCRIM No.] 520, which defines that crime.
>
> "*The People must prove that the members* of the alleged conspiracy *had an* agreement and *intent to commit murder*. . . . [¶] . . . [¶]
>
> "Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy. . . ." (Italics added.)

As referenced in CALCRIM No. 563 *ante*, the court instructed with modified CALCRIM No. 520 on murder with malice aforethought, stating in part:

> "To prove that a defendant intended to commit the crime of murder, the People must prove that:
>
> "1. *The defendant intended* to commit an act *to cause the death of another person*;
>
> "2. *When the defendant formed the intent to kill, he or she had a state of mind called malice aforethought*; [¶] AND
>
> "3. When the defendant formed the intent to kill, he or she had no lawful excuse or justification to kill.
>
> "The defendant acted with *malice* if he or she *unlawfully intended to kill*. It is a mental state that must be formed before the act that causes death is committed." (Italics added.)

The court also instructed with modified CALCRIM No. 417 that a member of a conspiracy is "also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy." The court continued that

instruction with the language that Lovejoy apparently asserts is erroneous in the wake of Senate Bill No. 1437, stating:

> "To prove that defendant Diana Lovejoy is guilty of the crime charged in Count Two, attempted murder, the People must prove that:
>
> "1. The defendant Diana Lovejoy conspired to commit murder, as charged in Count One;
>
> "2. A member of the conspiracy committed attempted murder, as charged in Count Two, to further the conspiracy; [¶] AND
>
> "3. *Attempted [m]urder was a natural and probable consequence of the common plan and design of the crime of murder that the defendant conspired to commit*." (Italics added.)

Defining the offense of attempted murder, as charged in Count 2, the court instructed with CALCRIM No. 600, stating in part: "To prove that a defendant is guilty of attempted murder, the People must prove that: [¶] . . . [¶] 2. *The defendant intended to kill* that person."[16] (Italics added.)

The court also instructed with modified CALCRIM No. 401 on the alternative theory of aiding and abetting attempted murder, stating in part that the People had to prove, among other elements, that Lovejoy "shared the perpetrator's intent to kill." Based on the court's instructions, the jury returned verdicts finding Lovejoy guilty of both conspiracy to commit murder (count 1) and attempted murder (count 2).

---

16 The court also instructed with CALCRIM No. 601 that if the jury found Lovejoy guilty of attempted murder, it must then decide whether the attempted murder was done willfully and with deliberation and premeditation. The jury made the additional finding that in committing the attempted murder, Lovejoy acted willfully and with deliberation and premeditation.

California Constitution, article VI, section 13, prohibits a reviewing court from reversing a conviction based on trial court error unless that error is prejudicial. In the context of instructional error, the California Supreme Court stated: "Instructional *error* regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error *did not contribute to the verdict*." (*People v. Chun* (2009) 45 Cal.4th 1172, 1201 (*Chun*), italics added.) "[T]o find the error harmless, a reviewing court must conclude, beyond a reasonable doubt, that the *jury based its verdict on a legally valid theory . . . .*" (*Id*. at p. 1203, italics added.) Alternatively stated, "[a]n instructional error presenting the jury with a legally invalid theory of guilt does not require reversal . . . *if other parts of the verdict demonstrate that the jury necessarily found the defendant guilty on a proper theory*." (*People v. Pulido* (1997) 15 Cal.4th 713, 727 (*Pulido*), italics added.)

Again, assuming arguendo that the court erred, as Lovejoy asserts, in instructing on criminal liability for acts done (e.g., attempted murder) that are natural and probable consequences of the conspiracy to commit murder, we conclude that the assumed error was harmless beyond a reasonable doubt.[17] Based on our review of the court's instructions, as quoted *ante*, it is clear that the jury in fact, necessarily found that Lovejoy had the requisite malice for attempted murder (i.e., that she had the intent to kill

---

17 We assume the challenged instructions were erroneous as Lovejoy asserts solely to dispose of her appellate contention. We express no position on whether those instructions were actually erroneous or whether Lovejoy is correct in her suggested interpretation of Senate Bill No. 1437.

Mulvihill). In particular, to find Lovejoy guilty of conspiracy to commit murder, modified CALCRIM No. 563 required the jury to find, among other elements, that Lovejoy did agree with McDavid "to intentionally and unlawfully kill" Mulvihill and that Lovejoy "intended that [she or McDavid] would intentionally and unlawfully kill" Mulvihill. If the jury had found that Lovejoy did not have the intent to kill Mulvihill, CALCRIM No. 563 required the jury to find her not guilty of conspiracy to commit murder, instructing: "Someone . . . who does not intend to commit the crime [i.e., murder] is not a member of the conspiracy."[18] By finding Lovejoy guilty of conspiracy to commit murder (count 1), the jury necessarily found that she had the intent to unlawfully kill Mulvihill.

Further, CALCRIM No. 417, the attempted murder instruction, informed the jury that in order to find Lovejoy guilty of attempted murder, it had to find that, "[t]he defendant Diana Lovejoy conspired to commit murder, as charged in Count One," which required a finding of an intent to kill, and CALCRIM No. 401, the aiding and abetting instruction, informed the jury that in order to find Lovejoy guilty under that theory of liability, it had to find that Lovejoy "shared the perpetrator's intent to kill." Because the jury's verdict finding Lovejoy guilty of attempted murder (count 2) required the jury to find, among other elements, that she had the intent to kill Mulvihill, whether that guilty verdict was based on the theory that she conspired with McDavid to commit murder

---

18 As noted *ante*, CALCRIM No. 520 instructed the jury that to find Lovejoy intended to commit the crime of murder, it had to find, among other elements, that she had "malice aforethought," i.e., she "unlawfully intended to kill."

(count 1) or the theory that she aided and abetted McDavid's attempt to murder Mulvihill, her conviction of attempted murder was based on a legally valid theory (i.e., the jury necessarily found that she had the intent to kill.) (*Chun*, *supra*, 45 Cal.4th at p. 1205.) Lovejoy has not shown how, based on the court's instructions, the jury could have found her guilty of conspiracy to commit murder without necessarily finding that she had the intent to kill Mulvihill. The instructional error that she asserts with respect to the court's instructions on natural and probable consequences is therefore harmless beyond a reasonable doubt and does not require reversal of her attempted murder conviction. (*Pulido*, *supra*, 15 Cal.4th at p. 727.)[19]

---

19 In the attempted murder cases pending before the California Supreme Court regarding the applicability of Senate Bill No. 1437 to their offenses, the target offenses as to which the natural and probable consequences instruction was given are offenses that do not themselves require a finding of intent to kill (see, e.g., *Lopez*, *supra*, 38 Cal.App.5th at pp. 1091-1092 [target offense was vandalism]; *Medrano*, *supra*, 42 Cal.App.5th at p. 1015 [target offense was assault likely to cause bodily harm]). Here, the *target offense* of the conspiracy charged in this case was *murder*. To commit the target offense in the conspiracy charged against her, Lovejoy had to have the same intent as the intent required to commit the nontarget offense of murder under the natural and probable consequences theory (i.e., an intent to kill). Thus, the jury necessarily found that Lovejoy intended to kill Mulvihill, rendering harmless beyond a reasonable doubt any error in the giving of the natural and probable consequences instruction.

DISPOSITION

McDavid's sentence is vacated and the matter is remanded for resentencing for the limited purpose of allowing the trial court to exercise its discretion as to whether to strike the section 12022.53, subdivision (d) enhancements. In all other respects, the judgments are affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

DATO, J.